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1066

No. 2529

United States
Circuit Court of Appeals

For the Ninth Circuit. 1066

R. C. WOOD, JOHN L. MCGINN and J. A. JES-
SON,

Appellants,

VS.

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation, Organized
Under the Laws of the State of Nevada,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Alaska, Fourth Division.

Filed

AUG 12 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

R. C. WOOD, JOHN L. MCGINN and J. A. JES-
SON,

Appellants,

vs.

F. G. NOYES, as Receiver of the WASHINGTON-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within

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*In the District Court for the Territory of Alaska,
Fourth Division.*

No. 1761.

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a Corporation, Organized under the Laws of the State of Nevada,

Plaintiff and Appellee,

vs.

JOHN ZUG, JAS. W. HILL, JOHN L. MCGINN, DAVE YARNELL, DAVID PETREE, L. T. ERWIN, R. C. WOOD, G. A. COLEMAN, JESSON BROTHERS, a Copartnership Composed of L. N. JESSON, J. A. JESSON and E. R. JESSON; also, L. N. JESSON, J. A. JESSON and E. R. JESSON, as Individuals; J. L. SALE, A. T. SMITH, J. A. HEALEY, G. W. PALMER, Mrs MARY ANDERSON, MARGARET HALLY, S. DOCKHAM, M. F. HALL, VIOLET GAUSTAD, Mrs. ANNA C. SULLIVAN, JOHN ANDERSON, JOHN E. HOLMGREN, JOHN FLYGAR, B. R. DUSENBURY, ANNIE B. CLAYPOOL, S. E. & ROBERT SHEPHARD, Copartners Doing Business as SHEPHARD BROS., H. G. C. BALDRY, JOHN PARONS, LUCY PARSONS, W. E. BALDRY, CHAS. FREY, PAUL FISHER, HANS STARK, GEO. PRESTON, DAN RYAN, SUSIE KOTZCH and CLARA MARKS,

Defendants and Appellants.

Names and Addresses of Attorneys of Record.

O. L. RIDER, Venita, Oklahoma,

R. F. ROTH, Fairbanks, Alaska,

Attorneys for Plaintiff and Appellee.

McGOWAN & CLARK, Fairbanks, Alaska,

A. R. HEILIG, Fairbanks, Alaska,

JOHN L. MCGINN, Keystone Apartments, San
Francisco, Calif.,

Attorneys for Defendants and Appellants.

[1*]

[Title of Court and Cause.]

Praecipe.

To the Clerk of the Above-Entitled Court:

You are hereby directed to make and prepare the record on appeal in the above-entitled cause, and have the same in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, by the 1st day of January, 1915; and that, in preparing said transcript, it shall be made up of the following papers:

Complaint;

Amended Answer of J. A. Jesson, John L. McGinn
and R. C. Wood;

Reply to said Answer;

Findings of Fact and Conclusions of Law;

Judgment and Decree;

Bill of Exceptions;

Order Settling Bill of Exceptions;

*Page-number appearing at foot of page of Original Certified Transcript of Record.

Assignments of Error;
Petition for Appeal;
Order Allowing Appeal;
Bonds on Appeal;
Citation, and Admission of Service Thereon;
Stipulating Extending the Return Day and Time
for Docketing Said Cause on Appeal; [2]
Order Extending Return Day and Time for Dock-
eting Said Cause on Appeal;
Stipulation for Printing Transcript;
Stipulation as to Record on Appeal;
Praeceptum for Transcript; and
Stipulation as to Making Up of Record.

McGOWAN & CLARK,

A. R. HEILIG,

JOHN L. McGINN,

Attorneys for Defendants Wood, McGinn and J. A.
Jesson.

[Endorsed]: Filed in the District Court, Terri-
tory of Alaska, 4th Div. Sep. 19, 1914. Angus Mc-
Bride, Clerk. By P. R. Wagner, Deputy. [3]

[Title of Court and Cause.]

Complaint.

Plaintiff complains of defendants and for cause of
action alleges:

I.

The Washington-Alaska Bank is, and ever since
the 21st day of January, 1908, has been a corporation
duly organized and existing under and by virtue of
the laws of the State of Nevada. Said Washington-

Alaska Bank was originally incorporated under the corporate name of "The Fairbanks Banking Company," but afterward, on or about, or shortly prior to, the 14th day of September, 1910, its name was by amendments to its Articles of Incorporation duly changed to "Washington-Alaska Bank." The authorized capital stock of plaintiff corporation is and was at all times since its incorporation \$300,000.00, divided into 3000 shares of the par value of \$100 each.

II.

On and for a long time prior to the 12th day of April, 1910, the said Washington-Alaska Bank, then, however, under the name of the Fairbanks Banking Company, was engaged in the general business of banking at the city of Fairbanks, Territory of Alaska, and [4] as a part of its business had been accepting and receiving deposits from the public generally and said Washington-Alaska Bank did thereafter and continuously until and including the 4th day of January, 1911, continue to conduct and carry on said business of banking at said city of Fairbanks, Territory of Alaska, and to so accept and receive deposits from the public generally.

III.

On the said 12th day of April, 1910, the outstanding issued capital stock of the said Washington-Alaska Bank, then known as the Fairbanks Banking Company was 1686 shares, and the defendants above named were, on said 12th day of April, 1910, stockholders therein as follows:

John Zug	was the owner of					10 shares.
Jas. W. Hill	"	"	"	"	100	"
John L. McGinn	"	"	"	"	100	"
Dave Yarnell	"	"	"	"	50	"
David Petree	"	"	"	"	10	"
L. T. Erwin	"	"	"	"	11	"
R. C. Wood	"	"	"	"	25	"
G. A. Coleman	"	"	"	"	10	"
L. N. Jesson	"	"	"	"	100	"
J. A. Jesson	"	"	"	"	100	"
E. R. Jesson	"	"	"	"	100	"
J. L. Sale	"	"	"	"	10	"
A. T. Smith	"	"	"	"	5	"
J. A. Healey	"	"	"	"	5	"
G. W. Palmer	"	"	"	"	2	"
Mrs. Mary Anderson	"	"	"	"	10	"
Margaret Hally	"	"	"	"	10	"
S. Dockham	"	"	"	"	2	"
M. F. Hall	"	"	"	"	5	"
Violet Gaustad	"	"	"	"	5	"
Mrs. Anna C. Sullivan	"	"	"	"	50	"
John P. Anderson	"	"	"	"	25	"
John E. Holmgren	"	"	"	"	10	"
John Flygar	"	"	"	"	25	"
B. R. Dusenbury	"	"	"	"	35	"
Annie Claypool	"	"	"	"	10	"
S. E. & Robert Shephard	"	"	"	"	50	"
H. G. C. Baldry	"	"	"	"	80	"
John Parsons	"	"	"	"	5	"
Lucy Parsons	"	"	"	"	5	"
W. E. Baldry	"	"	"	"	2	"
Chas. Frey	"	"	"	"	20	"

Paul Fisher	“	“	“	“	25	“
Hans Stark	“	“	“	“	25	“
Geo. Preston	“	“	“	“	5	“
Dan Ryan	“	“	“	“	25	“
Susie Kotsch	“	“	“	“	10	“
Clara Marks	“	“	“	“	10	“

[5]

IV.

On and for a long time prior to said April 12th, 1910, said Washington-Alaska Bank, then known as the Fairbanks Banking Company, was in a grossly insolvent and bankrupt condition and its assets were insufficient in value by more than \$100,000.00 to pay its deposits and other liabilities. Notwithstanding the said grossly insolvent and bankrupt condition of said bank, the Board of Directors thereof did on said 12th day of April, 1910, wrongfully and fraudulently declare and order to be paid to the then stockholders of said Washington-Alaska Bank, then known as the Fairbanks Banking Company, a dividend of twenty per cent or twenty dollars per share, on its then outstanding capital stock of \$168,800.00. On said 12th day of April, 1910, said Washington-Alaska Bank owed to depositors the sum of \$876,972.28 and had other liabilities amounting to \$83,717.53.

V.

Said dividend was on or about April 14th, 1910, actually paid to and received by the defendants in manner and amount as follows:

To the defendant Jas. W. Hill, in cash.....	\$2600.00
To the defendant John L. McGinn, in cash.....	2000.00
To the defendant Dave Yarnell, in cash.....	1000.00
To the defendant L. T. Erwin, in cash.....	220.00
To the defendant R. C. Wood, in cash.....	500.00

To the defendants L. N. Jesson, J. A. Jesson and E. R. Jesson, the sum of \$2000.00 each, all of which sums amounting in all to \$6000.00 was paid to and received by the defendants Jesson Brothers, a copartnership, in cash.

To the defendant J. L. Sale, in cash.....	200.00
A. T. Smith, in cash.....	100.00
J. A. Healey, in cash.....	100.00
G. W. Palmer, in cash.....	40.00
Mrs. Mary Anderson, in cash.....	200.00
Margaret Hally, in cash.....	200.00
S. Dockham, in cash.....	40.00
M. F. Hall, in cash.....	100.00
Violet Gaustad, in cash.....	100.00
Mrs. Anna C. Sullivan, in cash.....	1000.00
John P. Anderson, in cash.....	500.00
John F. Holmgren, in cash.....	200.00
John Flygar, in cash.....	500.00
B. R. Dusenbury, in cash.....	700.00
Annie B. Claypool, in cash.....	200.00

[6]

To the defendants S. E. and Robert Shephard, co-partners as Shephard Brothers, in cash.....	1000.00
To the defendant H. G. C. Baldry, in cash.....	1600.00
To the defendant John Parsons, in cash.....	100.00
To the defendant Lucy Parsons, in cash.....	100.00
To the defendant W. E. Baldry, in cash.....	40.00
To the defendant Chas. Frey, in cash.....	400.00
To the defendant Paul Fisher, in cash.....	500.00
To the defendant Hans Stark, in cash.....	500.00
To the defendant Geo. Preston, in cash.....	100.00
To the defendant Dan Ryan, in cash.....	500.00
To the defendant Susie Kotsch, in cash.....	200.00
To the defendant Clara Marks, in cash.....	200.00

To the defendant John Zug, by crediting the sum of \$200 being the amount of the said dividend payable to him, as a partial payment on a certain promissory note of said John Zug then held by said Washington-Alaska Bank, which said promissory note was afterwards, prior to January 4th, 1911, paid by said John Zug, and said note surrendered to him as fully paid.

To the defendant G. A. Coleman, by crediting the sum of \$200.00, being the amount of said dividend payable to him, as a partial payment on a certain promissory note of said G. A. Coleman, then held by said Washington-Alaska Bank, the balance of which said note was afterwards, prior to January 4th, 1911, paid by said G. A. Coleman and said note surrendered to him as fully paid.

To the defendant David Petree, by crediting the sum of \$200.00, being the amount of said dividend payable to him, as a partial payment on a certain promissory note of said David Petree then held by said Washington-Alaska Bank, the balance of which said note was afterwards, and prior to January 4th, 1911, paid by said David Petree and said note surrendered to him as fully paid.

VI.

After said 12th day of April, 1910, although said Washington-Alaska Bank, then known as the Fairbanks Banking Company, was at all times insolvent and in a failing condition, said bank nevertheless continued actively in business as a bank at said city of Fairbanks and to receive deposits from the public generally until and including January 4th, 1911, and

thereafter on January 5th, 1911, in a certain suit entitled "Tanana Valley Railroad Company, a corporation, and John Zug, plaintiffs, vs. Washington-Alaska Bank, a corporation, defendant," commenced in said District Court, Territory of Alaska, Fourth Division, an order was duly given and made appointing F. W. Hawkins receiver of said Washington-Alaska Bank, who thereupon duly qualified and entered upon his duties as such receiver. Thereafter, on the 6th day of January, 1911, said [7] District Court by an order duly given and made appointed E. H. Mack, jointly with said Hawkins, receiver of said Washington-Alaska Bank, and said Mack thereupon duly qualified and entered upon his duties as such receiver; and thereafter said Hawkins and Mack continued to be and act as receivers of said Washington-Alaska Bank until the 12th day of May, 1911, when said Hawkins and Mack resigned as such receivers, and thereupon on said date last named said District Court, by an order duly given and made and entered, appointed the plaintiff, F. G. Noyes, receiver of said Washington-Alaska Bank, and said F. G. Noyes thereupon duly qualified as such receiver, and ever since has been, and now is the duly qualified and acting receiver of the said Washington-Alaska Bank, and as such is plaintiff in this suit.

VII.

On the date and at the time said Washington-Alaska Bank ceased business on January 4th, 1911, said Washington-Alaska Bank had liabilities in excess of \$1,037,296.13 consisting of amounts due depositors, other than banks, of \$921,357.56, and

amounts due banks in excess of \$115,938.77, and the assets of said Washington-Alaska Bank were then and still are insufficient by more than the sum of \$200,000.00 to pay said liabilities in full.

VIII.

By reason of the defendants herein being so numerous, to prosecute a separate action at law against each of said defendants for the amount of the dividend received by them respectively, would cause a great multiplicity of suits and great and unnecessary expense and furthermore the trial of the issues involved herein will involve the examination into many complicated accounts, which can only properly be done in a court of equity, therefore plaintiff alleges that he has in the premises no plain, speedy or adequate remedy at law, and therefore invokes the aid of a court of equity where matters of this kind are [8] properly cognizable and relievable.

IX.

The defendants L. N. Jesson, J. A. Jesson and E. R. Jesson, are and were at all times herein mentioned copartners engaged in business under the firm name of Jesson Brothers, and the defendants S. E. and Robert Shephard are and were at all times herein mentioned copartners engaged in business as Shephard Brothers.

WHEREFORE, Plaintiff prays for judgment against the defendants as follows:—

Against the defendant John Zug for the sum of \$200.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant G. A. Coleman for the sum

of \$200.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant David Petree for the sum of \$200.00, together with interest thereon from April 14th, 1900, at the rate of 8% per annum;

Against the defendant Jas. W. Hill for the sum of \$2600.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant John L. McGinn for the sum of \$2000.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant Dave Yarnell for the sum of \$1000.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant L. T. Erwin for the sum of \$220.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant R. C. Wood for the sum of \$500.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendants Jesson Brothers, a co-partnership, composed of L. N. Jesson, J. A. Jesson, and E. R. Jesson, and against said L. N. Jesson, J. A. Jesson and E. R. Jesson, each individually, for the sum of \$6000, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant J. L. Sale for the sum of \$200.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant A. T. Smith for the sum of \$100.00, [9] together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant J. A. Healey for the sum of \$100.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant G. W. Palmer for the sum of \$40.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant Mrs. Mary Anderson for the sum of \$200.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant Margaret Hally for the sum of \$200.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant S. Dockham for the sum of \$40.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant M. F. Hall for the sum of \$100.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant Violet Gaustad for the sum of \$100.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant Mrs. Anna C. Sullivan for the sum of \$1000.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant John P. Anderson for the sum of \$500.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant John E. Holmgren for the sum of \$200.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant John Flygar for the sum of \$500.00, together with interest thereon from April

14th, 1910, at the rate of 8% per annum;

Against the defendant B. R. Dusenbury for the sum of \$700.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant Annie B. Claypool for the sum of \$200.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendants S. E. and Robert Shephard, copartners as Shephard Brothers, for the sum of \$1000.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant H. G. C. Baldry for the sum of \$1600.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum; [10]

Against the defendant John Parsons for the sum of \$100.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant Lucy Parsons for the sum of \$100.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant W. E. Baldry for the sum of \$40.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant Chas. Frey for the sum of \$400.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant Paul Fisher for the sum of \$500.00, together with interest thereon from August 14th, 1910, at the rate of 8% per annum;

Against the defendant Hans Stark for the sum of \$500.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant Geo. Preston for the sum of \$100.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant Dan Ryan for the sum of \$500.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant Susie Kotsch for the sum of \$200.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

Against the defendant Clara Marks for the sum of \$200.00, together with interest thereon from April 14th, 1910, at the rate of 8% per annum;

PLAINTIFF ALSO PRAYS for all other and further relief to which he may be in equity entitled, including costs of suit.

IRA D. ORTON,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

F. G. Noyes, being first duly sworn, deposes and says: I am the plaintiff named in the foregoing complaint; I have read said complaint, know the contents thereof, and believe [11] the same to be true.

F. G. NOYES.

Subscribed and sworn to before me this 13th day of April, A. D. 1912.

RICHARD H. GEOGHEGAN,
Notary Public in and for the Territory of Alaska.

[Endorsed]: No. 1761. In the District Court for the Territory of Alaska, Fourth Division. F. G. Noyes as Receiver of Washington-Alaska Bank, a Corporation, Plaintiff, vs. John Zug et al., Defend-

ants. Complaint. Filed in the District Court, Territory of Alaska, 4th Div. April 13, 1912. C. C. Page, Clerk, by G. F. Gates, Deputy. [12]

[Title of Court and Cause.]

Amended Answer.

Come now the defendants John A. Jesson, M. F. Hall, David Petree, John L. McGinn, R. C. Wood, James W. Hill, E. R. Jesson, Mrs. Mary Anderson, John Zug, John A. Healey and John L. Sale, and, by leave of the Court first had and obtained, file this their Amended Answer to plaintiff's complaint on file in the above-entitled action, and admit, deny and allege as follows, to wit:

I.

Admit the allegations of paragraph I and paragraph 2 of said complaint.

II.

These defendants, other than R. C. Wood, admit that they were the owners of the number of shares of capital stock of the Fairbanks Banking Company, a corporation, set opposite their respective names in said paragraph; and, as to the other matters contained in said paragraph 3, they say that they have no knowledge or information sufficient to form a belief, and therefore deny the same.

III.

Answering paragraph 4 of said complaint, these defendants admit that the board of directors on the 12th day of April, 1910, declared and ordered to be paid a dividend of twenty dollars per share of its then outstanding capital stock; and deny each and every

other allegation contained therein.

IV.

Answering paragraph 5, these defendants, save and except [13] the defendants R. C. Wood, John A. Jesson and James W. Hill, admit that they received the amount of the dividend as set forth in said paragraph; and, as to the other allegations, matters, and things therein contained, all the answering defendants deny any knowledge or information sufficient to form a belief.

And the said Wood denies that he received any dividend for or on account of any stock.

And the said E. R. Jesson and John A. Jesson deny that said John A. Jesson is or was a member of the firm of Jesson Brothers, and that said firm consists of W. R. Jesson, L. N. Jesson and John A. Jesson.

And said John A. Jesson denies that said money so declared as a dividend on his stock was paid to Jesson Brothers, save and except that he admits that said money was paid to Jesson Brothers in payment of indebtedness owing by him to Jesson Brothers, and for his own private account.

And defendant Hill denies that any part of portion of said dividend was paid to him; and alleges that he had no knowledge thereof; and denies that he ever received any of said money so declared as a dividend on his stock.

V.

Answering paragraph 6, these defendants deny that said bank was on the 12th day of April, 1910, and at all times thereafter, insolvent and in a failing

condition; but admit the institution of an action by the Tanana Valley Railroad Company and John Zug, plaintiffs, vs. the Washington-Alaska Bank, a corporation, defendant, and the appointment of F. W. Hawkins and E. H. Mack as receivers and the qualification of said receivers, as alleged in said paragraph 6; and, as to the other matters and things in said paragraph contained, these answering defendants allege that they have no knowledge or information thereof sufficient to form a belief, and therefore deny the same. [14]

VI.

As to the matters and things set forth in paragraph 7 of said complaint, these answering defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

VII.

Answering paragraph 8 of said complaint, these defendants deny each and every allegation therein contained.

VIII.

Answering paragraph 9 of said complaint, these defendants John A. Jesson and E. R. Jesson deny that at all times mentioned in the complaint they were engaged in business under the firm name and style of Jesson Brothers, or otherwise.

These defendants, with the exception of Hill, Wood and John A. Jesson, for a further and separate answer and defense, allege:

I.

That defendants E. R. Jesson, M. F. Hall, David Petree, Mary Anderson, John Zug and John L. Sale

were at none of the times mentioned in the complaint officers or directors of said Fairbanks Banking Company, later known as the Washington-Alaska Bank.

II.

That the defendant James W. Hill was not a director of said bank after the middle of September, 1909.

III.

That the defendant Healey was not a director of said bank until the month of June, 1910.

IV.

That on or subsequent to the 15th day of April, 1910, these defendants received from said bank a dividend in the amount set opposite their respective names as in the complaint alleged;

That at the time said dividend was declared and at the [15] time they received the same, the said bank was solvent, and the defendants believed it so to be, and received said dividend in good faith relying on the officers of said bank, and believed that the dividend paid to them came out of the profits of said bank and not otherwise.

The defendant Wood, for a further and separate answer, alleges:

I.

That the dividend declared and paid to him by the Fairbanks Banking Company was paid to him for the use and benefit of Joseph Conta, who was the true owner of said shares of stock standing in the name of the said Wood; and that at the time said dividend was declared, and at the time he received the same, said bank was solvent and the defendant Wood be-

lieved it so to be and received said dividend in good faith and in the honest belief that said bank was solvent; that said Wood paid to said Conta the amount of said dividend so received by him, prior to any notice that said bank was insolvent and could not meet its liabilities.

And the defendant Hill, for a further and separate answer, alleges:

I.

That he never received any dividend from the Fairbanks Banking Company for or on account of any stock owned by him in said corporation.

II.

That at the time of the declaration of said dividend, he was not within the District of Alaska, and the amount of the dividend that he was entitled to receive upon his stock was, without his knowledge or consent, paid to E. T. Barnette. [16]

III.

That the said Hill never had any notice that said dividend was declared, until after the suspension of said bank.

IV.

That at the time of the declaration of said dividend, the stock of the said Hill was pledged to E. T. Barnette, and the same remained upon the books of said bank in the name of the said Hill.

V.

That at the time the said dividend was received by the said E. T. Barnette, the debt due the said E. T. Barnette, to secure which said stock was pledged, was not due; That the said Fairbanks Banking Com-

pany, without authority from said Hill, paid said dividend to said E. T. Barnette.

VI.

That at the time of the declaration of said dividend, the said Hill was not an officer or director of said Fairbanks Banking Company nor had he been an officer or director thereof subsequent to the 15th day of September, 1909.

VII.

That at the time said bank paid said dividend to said E. T. Barnette, the said bank was solvent, and the said E. T. Barnette believed it to be so and received said dividend in the honest belief that said bank was solvent.

The defendant John A. Jesson, for a further and separate answer alleges:

I.

That at the time said dividend was declared, he was indebted to Jesson Brothers, consisting of E. R. Jesson, and L. N. Jesson, and that said Fairbanks Banking Company paid the amount declared as a dividend on the stock owned by said John A. Jesson to E. R. Jesson and L. N. Jesson. [17]

II.

That at the time said dividend was declared, said John A. Jesson believed that said bank was solvent; and said dividend was paid to Jesson Brothers on indebtedness owing to them by this answering defendant, in good faith; and this defendant believed that the dividend so paid came from the profits of said bank, and not otherwise; and alleges that said

bank was solvent at the time said dividend was declared.

The defendants, for a further and separate defence to the plaintiff's complaint, allege:

I.

That upon the 12th day of April, 1910, at a meeting of the board of directors at which the dividend was declared by the Fairbanks Banking Company which is complained of in the complaint, the directors present at said meeting of the board of directors were: E. T. Barnette, Ray Brumbaugh, John A. Jesson, R. C. Wood, John L. McGinn, J. A. Jackson, and David Yarnell.

II.

That the name of said Fairbanks Company was, in the month of October, 1910, changed to the name of Washington-Alaska Bank of Nevada.

III.

That upon the 4th day of January, 1911, said Washington-Alaska Bank closed its doors and suspended business, and immediately thereafter F. W. Hawkins and E. H. Mack were appointed receivers by this Court to take care of and administer the estate of said bank, and they immediately entered upon the performance of their duties as such.

IV.

That in the month of March, 1911, the then receivers of the Washington-Alaska Bank, formerly Fairbanks Banking Company, [18] intended to bring a suit or action in the District Court for the Territory of Alaska Fourth Division against E. T. Barnette, who had been the president of said Fairbanks

Banking Company, and a director thereof, from the time of its organization as a corporation on March 12, 1908, until it closed its doors on January 4, 1911, and as such was active and influential in the management and control of said Fairbanks Banking Company.

V.

That at the time of the suspension of said bank, said E. T. Barnette was not within the Territory of Alaska, but shortly thereafter, and in the month of February, 1911, returned to Fairbanks, Alaska, and entered into negotiations with the creditors and depositors of said Washington-Alaska Bank and with the then receivers of said bank for the purpose of amicably adjusting all suits and causes of action that might exist against the said E. T. Barnette on account of his liability to the creditors of said bank on account of his management thereof from the time of its organization on the 12th day of March, 1908, until the 4th day of January, 1911.

VI.

That as a result of said negotiations, and in full satisfaction of all liability of the said E. T. Barnette to the creditors of said Washington- Alaska Bank for and on account of the acts and wrongs done by him, if any, during said time that he was president and director thereof, the said E. T. Barnette and Isabelle Barnette his wife executed an instrument in writing in which the said E. T. Barnette admitted his liability to the creditors and depositors of said bank and promised and agreed to pay all of the depositors and holders of unpaid drafts of said bank in full any de-

ficiency that might be found to exist upon the 18th day of November, 1914, between the amounts due said depositors [19] and holders of unpaid drafts on the 4th day of January, 1911, with interest thereon at the rate of 6 per cent per annum from said January 4th, 1911 until the same should be paid, and the amount realized out of the property and assets of said Washington-Alaska Bank and paid to said depositors and holders of unpaid drafts.

VII.

That said Isabelle Barnette was and is the wife of said E. T. Barnette, and the said Isabelle Barnette joined in said instrument in writing because of her desire to aid her said husband in paying the creditors and depositors of said Washington-Alaska Bank.

VIII.

That the said promises were made on the distinct understanding and agreement that no litigation would be instituted against the said E. T. Barnette or any other person or persons jointly liable with him for any act or deed done by him during the time that he was president and director of said bank as aforesaid; and that, for the purpose of preventing any litigation, and as security for the faithful performance of the promises made by said E. T. Barnette and Isabelle Barnette, the said E. T. Barnette and Isabelle Barnette on the 18th day of March, 1911, with the knowledge, consent and approval of this Court, conveyed to the receivers of said bank, and the said receivers, by order of this Court, accepted a conveyance of title to an improved plantation containing 18,723 acres of land situated in the Republic of Mexico, and

certain improved and income producing property and lots situated in the incorporated town of Fairbanks, Territory of Alaska, and certain large interests in valuable association placer mining claims situated in the Fairbanks Precinct, Territory of Alaska; all of which property belonged at the time of said conveyance to said E. T. Barnette and Isabelle Barnette, and were and are worth the sum of \$600,000, [20] a sum greatly in excess of all the unpaid debts and liabilities of said bank.

IX.

That in said deed of property situated in the Republic of Mexico, as well as in said deed to property situated in Alaska, it is expressly provided that if the depositors and holders of unpaid drafts are not paid in full by the 18th day of November, 1914, either out of the property and assets of said Washington-Alaska Bank or otherwise, or by the said E. T. Barnette and Isabelle Barnette, said receiver may sell all or any part of said land at private sale for the best possible prices obtainable; and that the moneys and funds derived from the sale of said properties shall then be paid to the depositors and owners of unpaid drafts in an amount sufficient to pay their claims and demands in full; and that, if the proceeds derived from the assets of said bank and the amounts realized from the sale of said properties shall be sufficient to pay said depositors and owners of unpaid drafts in full, then the same is to be disbursed amongst said depositors and owners of unpaid drafts pro rata; and that if the amount derived from the sale of said property shall exceed the amount sufficient to satisfy

said amounts in full, with interest as above set forth, then the balance is to be returned to said E. T. Barnette and Isabelle Barnette. And it is further provided in said deed that if, after applying the moneys received from the property and assets of said Washington-Alaska Bank and the sale of said properties mentioned in said deeds, and any moneys obtained from George Edgar Ward and W. B. Biggs on account of an option given to them upon the 18th day of November, 1909, to purchase an undivided 49/100 interest in and to said Mexican property for the sum of approximately \$225,000, there shall still remain a balance due said depositors and holders of unpaid drafts, the said E. T. Barnette and Isabelle Barnette promise and agree to pay said balance in full. [21]

X.

That in said deed of the property situated in the Territory of Alaska, the receivers and their successors are authorized and empowered to take possession of the same and to receive and collect the rents, royalties and issues thereof, and disburse the same to the depositors and holders of unpaid drafts, under the orders of this Court; and that, in the event the said E. T. Barnette and Isabelle Barnette and the said receivers or their successors shall deem it at any time advisable to sell any of said real estate situated in Alaska, that the same may be done by said receivers, and the proceeds derived from such sale disbursed to the depositors and holders of unpaid drafts, under the order of this Court.

XI.

That the said receiver, plaintiff herein, holds a

large amount of property belonging to said bank which is of great value and has not been converted into money, and said property so held by him and the property so conveyed to the receivers by said E. T. Barnette and Isabelle Barnette are more than sufficient to satisfy all the claims, demands and obligations of creditors of said Washington-Alaska Bank.

XII.

That on the 29th day of March, 1911, the then receivers of the said Washington-Alaska Bank, agreed to accept in full satisfaction of the liability of said E. T. Barnette to the creditors of said Washington-Alaska Bank the said deeds of said property upon the terms and conditions thereof and the said promises of the said E. T. Barnette and Isabelle Barnette therein, and the said E. T. Barnette and Isabelle Barnette made, executed and delivered said deeds and made the said promises contained therein upon the distinct understanding and agreement that the same were in full satisfaction of all suits or causes of action then [22] existing against said E. T. Barnette on account of any and all matters and things arising from his connection or management of the affairs of the said Fairbanks Banking Company afterward known as Washington-Alaska Bank, and in full satisfaction of all liability of the said E. T. Barnette to the creditors of said Washington-Alaska Bank; and that said receivers accepted and received said promises and said deeds to said property under order of this Court in full satisfaction of all claims and causes of action of whatsoever nature that existed against the said E. T. Barnette for and on account

of his management of the affairs of said bank from the 12th day of March, 1908, to the 4th day of January, 1911, and for and on account of his acts as president and as a director of said corporation.

XIII.

That the receivers of said Washington-Alaska Bank, before the delivery and acceptance of said deeds hereinbefore mentioned, intended to, and if said agreement and deeds had not been made, executed and delivered to said receivers as hereinbefore stated, would have instituted an action against said E. T. Barnette to recover from said E. T. Barnette the amount of the dividend which was declared by said Fairbanks Banking Company upon the 12th day of March, 1910, and which in the complaint in this action, in paragraph 4 thereof, is alleged to have been declared wrongfully and fraudulently.

XIX.

That the promises of said E. T. Barnette and Isabelle Barnette, and the deeds to the property hereinbefore mentioned, were given by the said E. T. Barnette and Isabelle Barnette upon the express understanding and agreement that the same were in full satisfaction of any liability of the said E. T. Barnette on account of the declaration of said dividend and in discharge of any causes of action against him for or on account thereof, and the same were accepted by the said receivers of said bank [23] upon the distinct understanding that the same were in full satisfaction of the liability of the said E. T. Barnette to the creditors of said bank on account of the declaration of said dividend, and in full discharge of the

said E. T. Barnette on any causes of action that might arise therefrom.

XX.

That the receivers have received from the rents, royalties and issues of the property situated in the Territory of Alaska the sum of \$31,400 in cash;

That the value of the property situate in the town of Fairbanks, Alaska, is the sum of \$25,000;

That the value of the mining property situate in the Fairbanks Recording District, Alaska, is the sum of \$20 000.

That the value of the Mexican property cannot be definitely determined at this time, but the same is of great value, and was, at the time of the execution of said deed, of the value of \$500,000.

XXI.

That the moneys received by the receivers from said properties and the value of the property conveyed by the said E. T. Barnette and Isabelle Barnette to the receivers as hereinbefore stated, is more than ample to satisfy in full all of the liability of the said E. T. Barnette and the directors and officers of said bank to said corporation for and on account of any acts, deeds, or wrongs done by them as such officers and directors, or otherwise.

XXII.

These defendants allege that the receivers have received full and complete satisfaction of any and all claims for and on account of the declaration and payment of the dividend made by the Fairbanks Banking Company.

WHEREFORE these defendants pray that plain-

tiff take [24] nothing by his action, and that they have and recover of and from said plaintiff their costs and disbursements incurred in this action.

JOHN L. MCGINN,
MCGOWAN & CLARK,
A. R. HEILIG,

Attorneys for Answering Defendants.

I, John L. McGinn, being first duly sworn depose and say, That I am one of the defendants in the foregoing entitled action, that I have read the complaint and know the contents thereof, and believe the same to be true.

JOHN L. MCGINN.

Subscribed and sworn to before me this 1st day of June, 1914.

[Seal]

ALBERT R. HEILIG,
Notary Public for Alaska.

Commission expires June 18, 1917.

[Endorsed]: No. 1761. District Court, 4 Division, Territory of Alaska. F. G. Noyes, Receiver, vs John Zug et al. Amended Answer. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 2, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [25]

[Title of Court and Cause.]

Reply.

I.

Comes now the plaintiff and for reply to the further and separate answer of the defendants, with the exception of Hill, Wood and John A. Jesson, says:

First. That he denies that said bank was solvent at the time said dividend was declared and at the time said defendants receive the same;

Second. That as to whether or not said defendants believed said bank to be solvent or as to whether or not they received said dividend in good faith relying on the officers of said bank, or as to whether or not they believed that the dividend paid to them came from the profits of said bank and not otherwise, this plaintiff has neither knowledge nor information sufficient to form a belief and he therefore denies the same.

II.

For reply to the further and separate answer of the defendant Wood plaintiff says:

First. That as to whether or not at the time said dividend was declared and that at the time the same was received by him said defendant Wood believed the said bank to be solvent, or as to whether or not said defendant Wood received said dividend in good faith and in the honest belief that said bank was solvent, this plaintiff has neither knowledge nor information sufficient to form a belief and he therefore denies the same. [26]

Second. Plaintiff denies each and every other allegation and statement contained in said further and separate answer of the said defendant Wood.

III.

For reply to the further and separate answer of the defendant Hill, plaintiff says:

First. That he admits that at the time of the

declaration of said dividend the said Hill was not in the District of Alaska;

Second. That he admits that at the time of the declaration of said dividend the stock of the said Hill remained upon the books of said bank in the name of the said Hill;

Third. As to whether or not the said Hill never had any notice that the said dividend was declared until after the suspension of said bank this plaintiff has neither knowledge nor information sufficient to form a belief and he therefore denies the same;

Fourth. As to whether or not at the time said dividend was declared the stock of the said Hill was pledged to E. T. Barnette and as to the time when said alleged debt become due, this plaintiff has neither knowledge nor information sufficient to form a belief and he therefore denies the same;

Fifth. He denies each and every other allegation and statement contained in said separate answer of the defendant Hill.

IV.

For reply to the further and separate answer of the defendant John A. Jesson plaintiff says:

First. That he denies that the said Fairbanks Banking Company paid the amount declared as a dividend on the stock owned by the said John A. Jesson to E. R. Jesson and L. N. Jesson;

Second. He denies that the said bank was solvent at the time said dividend was declared; [27]

Third. As to the remaining allegations and statements set forth in said separate answer of the de-

fendant John A. Jesson this plaintiff has neither knowledge nor information sufficient to form a belief and he therefore denies the same.

V.

For reply to the last further and separate defense of the defendants plaintiff says:

First. That he denies each and every allegation and statement therein contained, except as herein-after expressly admitted;

Second. He admits paragraphs I, II and III thereof;

Third. He admits that E. T. Barnette was president of the Fairbanks Banking Company and a director thereof from the time of its organization on March 12, 1908, until it closed its doors on January 4, 1911, and that as such he was active and influential in the management and control of said bank;

Fourth. He admits that at the time of the suspension of said bank the said E. T. Barnette was not within the Territory of Alaska, and that in the month of February, 1911, he returned to Fairbanks, Alaska;

Fifth. He admits that Isabelle Barnette was and is the wife of the said E. T. Barnette and that she joined him in the deeds of conveyance therein referred to;

Sixth. He admits the conveyance to the former receivers herein of title to the property referred to in said answer, and that he has taken possession thereunder of the property therein described and located in the Territory of Alaska;

Seventh. He admits that he has received the rents, royalties and issues of said property situated in the Territory of Alaska, and he alleges that the net amount thereof so received by him up to June 1st, 1914, is approximately \$31,478.65, less such reasonable charge as may be allowed for the collection thereof [28] as provided in said conveyance.

WHEREFORE, plaintiff prays that he have judgment against these defendants according to the prayer of his complaint herein.

O. L. RIDER,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

F. G. Noyes, being first duly sworn, deposes and says: That he as Receiver is plaintiff named in the foregoing reply; that he has read said reply, knows the contents thereof, and believes the same to be true.

F. G. NOYES.

Subscribed and sworn to before me this 4th day of June, 1914.

[Seal] W. F. WHITELY,
Notary Public in and for the Territory of Alaska,
Residing at Fairbanks, Alaska.

My commission expires Aug. 19, 1916.

Service of copy is hereby acknowledged this 4th day of June, 1914.

McGOWAN & CLARK,
J. L. McGINN and
A. R. Heilig,
Attorneys for Defendants Appearing.

[Endorsed]: No. 1761. In the District Court for the Territory of Alaska, Fourth Division. F. G. Noyes, Receiver of the Washington Alaska Bank, Plaintiff, vs. John Zug et al., Defendants. Reply.

Filed in the District Court, Territory of Alaska, 4th Div. Jun. 4, 1914. Angus McBride, Clerk.
[29]

[Title of Court and Cause.]

BE IT REMEMBERED that on the 8th day of June, 1914, the above-entitled matter came on for trial before the Court without a jury upon the issues as joined between the plaintiff and the defendants, the Honorable F. E. Fuller, Judge of said court, presiding; the plaintiff appearing in person and by his attorney, O. L. Rider; and the defendants appearing in person and by their respective attorneys John L. McGinn, A. R. Heilig, and McGowan & Clark.

And thereupon the plaintiff and the defendants so appearing, to wit, J. A. Jesson, James W. Hill, G. W. Palmer, E. R. Jesson, M. F. Hall, John L. McGinn, Dave Petree, John Zug, Mrs. Mary Anderson, R. C. Wood, J. L. Sale, G. A. Coleman, George Preston and J. A. Healey, in open court agreed to submit the issues herein for final determination upon the testimony adduced, the admissions of the parties contained and set forth in the pleadings herein, and upon the testimony, so far as the same is applicable, heretofore introduced and received by the Court in cause Number 1756 entitled "F. G. Noyes, Receiver of the Washington-Alaska Bank, a corporation,

plaintiff, vs. J. A. Jesson et al., defendants," pending in said court.

And thereupon the Court, after hearing the arguments of counsel and upon consideration of said pleadings and said testimony, and being fully advised in the premises, does hereby make and file, as constituting its decision in said case, the following [30] Findings of Fact and Conclusions of Law, to wit:

Findings of Fact.

I.

That the Washington-Alaska Bank, of which the plaintiff herein is receiver, was incorporated under the laws of the State of Nevada on the 21st day of January, 1908, with an authorized capital of \$300,000, divided into 3000 shares of the par value of \$100. each and that said bank was incorporated under the name of Fairbanks Banking Company; that subsequently, by amendment to its articles of incorporation, said name was changed to Washington-Alaska Bank.

II.

That said bank commenced business in the town of Fairbanks, Alaska, on the 16th day of March, 1908, and continued to carry on a general banking business in said town until the 4th day of January, 1911, when it suspended business and closed its doors.

III.

That on the 12th day of April, 1910, the said Fairbanks Banking Company, by its then Board of Directors, declared a twenty per cent dividend on

the par value of its then outstanding capital stock of \$168,000, which dividend amounted to \$33,720. That said dividend was paid to the then stockholders of said bank, the defendant herein, either in cash or by crediting the amount thereof upon notes owing by said stockholders to said bank in the amounts set forth in the complaint herein.

IV.

That of said stockholders, J. A. Jesson, J. W. Hill, G. W. Palmer, E. R. Jesson, M. F. Hall, John L. McGinn, Dave Petree, John Zug, Mrs Mary Anderson, R. C. Wood, J. L. Sale, G. A. Coleman, George Preston, and J. A. Healey have joined issue with the plaintiff upon the matters and things set up in the complaint, and are now before the Court. [31]

V.

That of the defendants now before the Court as aforesaid, J. A. Jesson, John L. McGinn, and R. C. Wood were directors of said bank at the time said dividend was declared and paid, and gave their consent to the same. That the said McGinn was, at said time, the owner of shares of the capital stock of said company of the par value of \$10,000, and there was paid to him thereon on said dividend the sum of \$2000; that the said defendant John A. Jesson was, at said time, the owner of shares of the capital stock of said Company of the par value of \$10,000, and there was paid to him thereon on said dividend the sum of \$2000; that the said Wood was, at said time, the owner of shares of the capital stock of said Company of the par value of \$2500, and there was paid to him thereon on said dividend the sum of \$500.

That none of the remaining defendants now before the Court as aforesaid were officers or directors of said bank at the time said dividend was declared or paid to them.

VI.

That at the time said dividend was declared and paid, the said Fairbanks Banking Company did not have any surplus or undivided profits out of which the same could be declared and paid, and said dividend was paid out of the capital of said bank. That said facts were known to the defendants McGinn, Wood, and J. A. Jesson, and each of them, at said time, or should have been known by them by the exercise of reasonable diligence.

VII.

That the dividend so paid to the defendants Hill, Palmer, E. R. Jesson, M. F. Hall, Petree, Zug, Mrs. Mary Anderson, Sale, Coleman, Preston, and Healey was received by them without knowledge on their part that said bank did not have any surplus or undivided profits out of which said dividend could be declared and paid, or that the same was paid out of the capital of said [32] bank, and they and each of them received the same in good faith and in the honest belief that the same was declared and paid to them out of the surplus or undivided profits of said bank.

VIII.

That said dividend was declared and paid in violation of the laws of the State of Nevada, under which said corporation was organized, and in violation of

the by-laws of the said Fairbanks Banking Company, and was wrongful and illegal.

IX.

That the assets of said bank now in the hands of said Receiver are insufficient to pay its liabilities, and the amount of said liabilities is more than \$470,000 in excess of the par value of said assets.

Conclusions of Law.

Upon the foregoing Findings of Fact, the Court finds as Conclusions of Law:

I.

That the defendant J. A. Jesson is liable to the plaintiff by reason of the payment to him of said dividend in the sum of \$2000.

II.

That the defendant John L. McGinn is liable to the plaintiff by reason of the payment to him of said dividend in the sum of \$2000.

III.

That the defendant R. C. Wood is liable to the plaintiff by reason of the payment to him of said dividend in the sum of \$500.

IV.

That the defendants J. W. Hill, G. W. Palmer, E. R. Jesson, M. F. Hall, Dave Petree, John Zug, Mrs. Mary Anderson, J. L. Sale, G. A. Coleman, George Palmer, J. A. Healey are not liable to the plaintiff in any sum by reason of the payment to them of said [33] dividend, and that as to them and each of them this action should be dismissed.

Let Decree be entered according to the above.

Signed this 6th day of July, 1914.

F. E. FULLER,

Judge of said Court.

Entered in Court Journal No. 2, page 38, at Iditarod, Alaska.

Entered in Court Journal No. 13, page 4, Fairbanks, Alaska.

Due service hereof admitted this 15 June, McGowan & Clark, A. R. Heilig, Attorney for John L. McGinn.

[Endorsed]: No. 1761. F. G. Noyes, Receiver, etc., Plaintiff, vs. John Zug et al., Defendants. Findings of Fact and Conclusions of Law. Proposed—Filed in the District Court, Territory of Alaska, 4th Div. Jun. 15, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

Filed in the District Court, Territory of Alaska, 4th Div. Jul. 6, 1914. Angus McBride, Clerk.
[34]

*In the District Court for the Territory of Alaska,
Fourth Division.*

No. 1761.

F. G. NOYES, Receiver of the Washington-Alaska
Bank, a Corporation,

Plaintiff,

vs.

JOHN ZUG et al.,

Defendants.

Decree.

BE IT REMEMBERED that on the 8th day of June, A. D. 1914, the above-entitled cause came on regularly for trial before the Court, without a jury, upon the issues as joined between the plaintiff and the defendants J. A. Jesson, James W. Hill, G. W. Palmer, E. R. Jesson, M. F. Hall, John L. McGinn, Dave Petree, John Zug, Mrs. Mary Anderson, R. C. Wood, J. L. Sale, G. A. Coleman, George Preston, and J. A. Healey; The Honorable F. E. Fuller, Judge of said court, presiding; the plaintiff appearing in person and by his attorney O. L. Rider, and the defendants appearing by their attorneys McGowan & Clark, John L. McGinn and A. R. Heilig;

And thereupon the plaintiff and the above-named defendants in open court agreed to submit the issues herein for final determination upon the testimony adduced and upon the admissions of the parties contained and set forth in the pleadings herein and upon the testimony, so far as the same is applicable to said issues, heretofore introduced and received by the Court in cause Number 1756 entitled "F. G. Noyes, Receiver of the Washington-Alaska Bank, a corporation, plaintiff, vs. J. A. Jesson et al., defendants," pending in said court.

And thereupon the Court, after hearing the arguments of counsel and upon consideration of said pleadings and said testimony, and being fully advised in the premises, did, on the 6th day of July, 1914, make and file its findings of fact and conclusions of law upon the issues herein; [35]

And thereupon upon consideration thereof it is by the Court ORDERED, ADJUDGED and DECREED, as follows, to wit:

I.

That the plaintiff have and recover of and from the defendant J. A. Jesson, the sum of \$2,000.00;

II.

That the plaintiff have and recover of and from the defendant John L. McGinn the sum of \$2,000.00;

III.

That the plaintiff have and recover of and from the defendant R. C. Wood the sum of \$500.00;

IV.

That the plaintiff take nothing as against the defendants James W. Hill, G. W. Palmer, E. R. Jesson, M. F. Hall, Dave Petree, John Zug, Mrs. Mary Anderson, J. L. Sale, G. A. Coleman, George Preston and J. A. Healey.

All of which is now finally ORDERED, ADJUDGED AND DECREED this 6th day of July, 1914, at the cost of the defendants J. A. Jesson, John L. McGinn and R. C. Wood.

Let execution issue for the enforcement of the judgment herein rendered against the defendants J. A. Jesson, John L. McGinn and R. C. Wood.

Dated Fairbanks, Alaska, this 6th day of July, 1914.

F. E. FULLER,

Judge of the District Court, Territory of Alaska,
Fourth Division.

Entered in Court Journal No. 2, page 41, Iditarod, Alaska;

Entered in Court Journal No. 13, page 5, Fairbanks, Alaska.

Service of copy accepted this — day of June, 1914. McGowan & Clark, John L. McGinn, A. R. Heilig.

[Endorsed]: No. 1761. In the District Court for the Territory of Alaska, Fourth Division. F. G. Noyes, Receiver of the Washington-Alaska Bank, Plaintiff, vs. John Zug et al., Defendants. Decree. [36]

Filed in the District Court, Territory of Alaska, 4th Div. Proposed. Jun. 15, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

Filed in the District Court, Territory of Alaska, 4th Div. Jul. 6, 1914. Angus McBride, Clerk. [37]

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED that upon the 8th day of June, 1914, the above-entitled cause came on for trial before the Judge of the above-entitled court; O. L. Rider appearing as attorney for the plaintiff, and the defendants appearing by their attorneys, John L. McGinn, A. R. Heilig and McGowan & Clark, the defendants represented by said counsel being J. A. Jesson, James W. Hill, G. M. Palmer, E. R. Jesson, M. F. Hall, John L. McGinn, David Petree, John Zug, Mrs. Mary Anderson, R. C. Wood, J. L. Sale,

G. A. Coleman, George Preston and J. A. Healey.

It was thereupon agreed to submit the issues involved in the pleadings in this cause for final determination upon the admissions contained in the pleadings herein, and upon the testimony and evidence introduced and received (so far as the same is applicable and material) in evidence by the Court in that certain case entitled *F. G. Noyes, receiver of the Washington-Alaska Bank, a corporation, plaintiff, vs. J. A. Jesson et al., defendants*, number 1756, and which said testimony and evidence is set forth in the Bill of Exceptions filed, settled and allowed in said cause of *F. G. Noyes, receiver, plaintiff, vs. J. A. Jesson et al., defendants*, number 1756, now on appeal to the United States Circuit Court of Appeals for the Ninth Circuit from this Court, which said Bill of Exceptions in said cause [38] number 1756 contains and includes all of the testimony, evidence and exhibits given, offered, admitted and used upon the trial of this cause in support of and against the allegations and denials of the Complaint Answers and Amended Answer of *J. A. Jesson, M. F. Hall, David Petree, John L. McGinn, R. C. Wood, James W. Hill, E. R. Jesson, Mrs. Mary Anderson, John Zug, John A. Healey and John L. Sale*, and of the Replies thereto.

BE IT REMEMBERED that after the plaintiff and the defendants had rested the said cause, the same was submitted to the Court for consideration and deliberation, and thereafter and before the Findings of Fact and Conclusions of Law had been made and signed by the Court and filed with the clerk

thereof, the defendants Wood, McGinn and J. A. Jesson requested the Court to make the following Findings of Fact and Conclusions of Law, namely:

1.

That on the 12th day of April, 1910, the said Fairbanks Banking Company by its then board of directors, declared a twenty per cent dividend on the par value of its then outstanding capital stock of \$168,600, which dividend amounted to \$33,720. That said dividend was paid to the stockholders of said bank either in cash or by crediting the amount thereof upon notes owing by said stockholders to said bank in the amount set forth in the complaint herein.

2.

That at the time said dividend was declared and paid the said Fairbanks Banking Company had undivided profits amounting to said sum of \$33,720, and said dividend was declared and paid out of the undivided profits of said bank.

3.

That in the month of September, 1909, said Fairbanks Banking Company purchased the entire capital stock of the Washington-Alaska Bank of Washington.

4.

That the end of the fiscal year of the Washington-Alaska Bank of Washington and of the Fairbanks Banking Company was the 31st day of December of each year, and at said time it had been the custom and practice of said Washington-Alaska Bank and said Fairbanks Banking Company to charge off all debts due said banks that in the judgment of their

officers were bad and uncollectible, [39] and which had not been charged off during said fiscal year.

5.

That said bad debts due to the bank and so charged off were not, after said time, carried as an asset of said bank; and, after said bad debts had been deducted from the assets, any profits that were shown to exist, after the deduction of all liabilities including outstanding stock, were placed in the undivided profit account, and was so carried until the end of the next fiscal year unless a dividend was declared upon the same or bad debts charged against the same during the next succeeding fiscal year.

6.

That at the end of the fiscal year of 1909, R. C. Wood, who was then the President and manager of the First National Bank, and also acting as advisory manager of said Washington-Alaska Bank and Fairbanks Banking Company, requested George Wesch, then cashier of the Washington-Alaska Bank, to make a list of the loans and discounts of said bank that he considered bad and uncollectible.

That said Wesch thereupon prepared a list of all the said loans and discounts due said bank that he considered bad and uncollectible, and presented the same to said R. C. Wood, and thereupon the said Wood and Wesch went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of \$8,599.59.

That said loans and discounts due said bank were

then and there, to wit, on December 31st, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were so charged off, there still remained undivided profits for the fiscal year ending December 31, 1909, amounting to the sum of \$56,106.97. [40]

7.

That the said George Wesch was and is a man of high standing in this community, a banker of experience, capable and honest, and well acquainted with the securities of said bank and the standing of its debtors.

8.

That the said R. C. Wood was a man of high standing in the community, the president of the First National Bank, a banker of experience, and well acquainted with the conditions of said Washington-Alaska Bank, and the securities held by it for loans made by, and due to, said bank.

9.

That the said R. C. Wood, immediately after his appointment as advisory manager of said banks, prepared a record of all the loans and discounts of said Washington-Alaska Bank and said Fairbanks Banking Company, which said record contained the names of the debtors, the amounts due the said Washington-Alaska Bank and Fairbanks Banking Company, and a description and the location of all property, real and personal, given to secure the loans made by said banks, which said record ever since the month of May, 1910, has been a record of said Fairbanks Banking Company, and is now in the pos-

session of the receiver thereof.

10.

That said record-book so containing the names of the debtors of said Washington-Alaska Bank and the Fairbanks Banking Company, and a description and location of the properties given to secure said debts, although in the possession of the present receiver from the date of his appointment, was never examined by him, and the securities mentioned and described in said book given to secure loans were not known to him to be in existence. [41]

11.

That at the end of the fiscal year, 1909, the said R. C. Wood requested J. A. Jackson, cashier of the Fairbanks Banking Company, to make out a list of loans and discounts of said Fairbanks Banking Company that he considered bad and uncollectible.

That said Jackson thereupon prepared a list of all said loans and discounts that he considered bad and uncollectible and presented the same to said R. C. Wood, and thereupon the said Wood and Jackson went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of \$24,937.37.

That said loans and discounts due said bank were then and there, to wit, on December 31st, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were so charged off, there still remained undivided profits for the fiscal year ending December 31, 1909, amounting to the sum of \$9,881.78.

12.

That the said J. A. Jackson was and is a man of high standing in the community, a banker of experience, capable and honest, and well acquainted with the securities of said bank and the standing of its debtors.

13.

That at the meeting of the board of directors of said Fairbanks Banking Company held on January 12, 1910, statements of the condition of the said Washington-Alaska Bank of Washington and the Fairbanks Banking Company as of date December 31, 1909, after said bad debts hereinbefore mentioned had been charged off, were presented by the officers of said banks to said board of directors; and, after the same had been discussed and [42] examined by said directors, the same were ordered filed.

That said statement showed that the undivided profits of the Washington-Alaska Bank for the year ending December 31, 1909, after deducting what the officers of said bank regarded to be all of its bad loans and discounts, was the sum of \$56,106.97.

That said statement showed that the undivided profits of the said Fairbanks Banking Company for the year ending December 31, 1909, after deducting all the bad debts, was the sum of \$9,881.78.

14.

That upon the 12th day of April, 1910, the directors of the Washington-Alaska Bank declared a dividend of \$50,000.

15.

That said dividend of the Washington-Alaska

Bank of Washington, to wit, \$50,000, was paid to its stockholders, the Fairbanks Banking Company, \$25,000.00, of which said sum was ordered by the directors to be placed to the credit of the undivided profit account of said Fairbanks Banking Company, and the other \$25,000.00 was directed to be credited on the amount for which said Fairbanks Banking Company was carrying the stock of said Washington-Alaska Bank.

16.

That after said sum of \$25,000 had been added to said undivided profit account of said Fairbanks Banks Banking Company, the undivided profit account of said bank at said time amounted to the sum of \$34,828.55.

17.

That at the date of the declaration of said dividend, and after the adding of said sum of \$25,000 to the undivided profit account, the books of said company showed that the undivided profit account amounted to the sum of \$34,828.55, and the directors at said time honestly and in good faith believed that [43] the undivided profits of said Fairbanks Banking Company was said sum of \$34,828.55, and said directors were so advised by the officers of said bank.

18.

That the profit of said Washington-Alaska Bank, and Fairbanks Banking Company, and First National Bank for the year ending December 31, 1909, was the sum of \$131,332.91; and, after charging off bad debts on said three banks to the amount of \$42,836.96, the net profits of said three banks for said

year was \$88,495.95.

19.

That the said Fairbanks Banking Company, at the time of the declaration of the dividend, was carrying the stock of the Gold Bar Lumber Company for the sum of \$341,949.00, and said directors in good faith believed, and from the reports of the officers of said Gold Bar Lumber Company, as well as from the reports of people of high standing who were acquainted with said property and the value thereof, had a right to believe, that said property was worth said amount.

20.

That the advancement made to the Tanana Electric Company by the Fairbanks Banking Company, for which two notes of the Tanana Electric Company were given to said bank amounting to the sum of \$27,997.38, were authorized and directed by the Scandinavian-American Bank of Seattle, State of Washington, and the said directors, at the time of the declaration of said dividend, believed and had a right to believe that the same was a good and valid claim against the said Scandinavian-American Bank, and a valuable asset of said Fairbanks Banking Company to the amount that the same was carried by them. [44]

21.

That said dividend was declared by said directors of said bank in good faith and in the honest belief, and after the exercise of due care, that the undivided profits of said bank amounted to said sum of \$34,828.55, and that the values placed upon the assets of said bank was the true and correct one, and that the

amount for which said bank was carrying its assets, and particularly its stocks, loans and discounts, were the true and correct valuation of the same.

22.

That the dividend so paid to the stockholders, and which was received by the defendant answering in this case, was received by them without knowledge on their part that said bank did not have any surplus or undivided profits out of which said dividend could be declared or paid, or that the same was paid out of the capital of said bank; and they and each of them received the same in good faith and in the honest belief that the same was declared and paid to them out of the surplus and undivided profits of said bank.

23.

That upon the 12th day of April, 1910, at a meeting of the board of directors at which the dividend was declared by the Fairbanks Banking Company which is complained of in the complaint, the directors present at said meeting of the board of directors, were: E. T. Barnette, Ray Brumbaugh, John A. Jesson, R. C. Wood, John L. McGinn, J. A. Jackson and David Yarnell.

24.

That the name of said Fairbanks Banking Company was, in the month of October, 1910, changed to the name of Washington-Alaska Bank, of Nevada. [45]

25.

That upon the 4th day of January, 1911, the said Washington-Alaska Bank closed its doors and suspended business, and immediately thereafter, F. W.

Hawkins and E. H. Mack were appointed receivers by this Court to take care of and administer the estate of said bank, and they immediately entered upon the performance of their duties as such.

26.

That in the month of March, 1911, the then receivers of the Washington-Alaska Bank, formerly Fairbanks Banking Company, intended to bring a suit or action in the District Court for the Territory of Alaska, Fourth Judicial Division, against E. T. Barnette, who had been the president of said Fairbanks Banking Company, and a director thereof, from the time of its organization as a corporation on March 12, 1908, until it closed its doors on January 4, 1911, and as such was active and influential in the management and control of said Fairbanks Banking Company.

27.

That at the time of the suspension of said bank, said E. T. Barnette was not within the Territory of Alaska, but shortly thereafter, and in the month of February, 1911, returned to Fairbanks, Alaska, and entered into negotiations with the creditors and depositors of said Washington-Alaska Bank, and with the then receivers of said bank, for the purpose of amicably adjusting all suits and causes of action that might exist against the said E. T. Barnette on account of his liability to the creditors of said bank on account of his management thereof from the time of its organization on the 12th day of March, 1908, until the 4th day of January, 1911.

28.

That as a result of said negotiations, and in full satisfaction [46] of all liability of the said E. T. Barnette to the creditors of said Washington-Alaska Bank for and on account of the acts and wrongs done by him, if any, during said time that he was president and director thereof, the said E. T. Barnette and Isabelle Barnette, his wife, executed an instrument in writing in which the said E. T. Barnette admitted his liability to the creditors and depositors of said bank and promised and agreed to pay all of the depositors and holders of unpaid drafts of said bank in full any deficiency that might be found to exist upon the 18th day of November, 1914, between the amounts due said depositors and holders of unpaid drafts on the 4th day of January, 1911, with interest thereon at the rate of six per cent per annum from said 4th day of January, 1911, until the same should be paid, and the amount realized out of the property and assets of said Washington-Alaska Bank and paid to said depositors and holders of unpaid drafts.

29.

That said Isabelle Barnette was and is the wife of said E. T. Barnette, and the said Isabelle Barnette joined in said instrument in writing because of her desire to aid her said husband in paying the creditors and depositors of said Washington-Alaska Bank.

30.

That the said premises were made on the distinct understanding and agreement that no litigation

would be instituted against the said E. T. Barnette or any other person or persons jointly liable with him for any act or deed done by him during the time that he was president and director of said bank as aforesaid; and that, for the purpose of preventing any litigation, and as security for the faithful performance of the promises made by said E. T. Barnette and Isabelle Barnette, the said E. T. [47] Barnette and Isabelle Barnette on the 18th day of March, 1911, with the knowledge, consent and approval of this Court, conveyed to the receivers of said bank, and the said receivers, by order of this Court, accepted, a conveyance of title to an improved plantation containing 18,723 acres of land situated in the Republic of Mexico, and certain improved and income-producing business property and lots situated in the incorporated town of Fairbanks, Territory of Alaska and certain large interests in valuable association placer mining claims situated in the Fairbanks Precinct, Territory of Alaska; all of which property belonged at the time of said conveyances to said E. T. Barnette and Isabel Barnette and were and are worth the sum of \$600,000.00, a sum greatly in excess of all the unpaid debts and liabilities of said bank.

31.

That in said deed of property situated in the Republic of Mexico, as well as in said deed to property situated in Alaska, it is expressly provided that if the depositors and holders of unpaid drafts are not paid in full by the 18th day of November, 1914, either out of the property and assets of said Wash-

ington-Alaska Bank or otherwise, or by the said E. T. Barnette and Isabelle Barnette, said receiver may sell all or any part of said land at private sale for the best possible prices obtainable; and that the moneys and funds derived from the sale of said properties shall then be paid to the depositors and owners of unpaid drafts in an amount sufficient to pay their claims and demands in full; and that, if the proceeds derived from the assets of said bank and the amounts realized from the sale of said properties shall be insufficient to pay said depositors and owners of unpaid drafts in full, then the same is to be disbursed amongst said depositors and owners of unpaid drafts *pro rata*; and that if the amount derived from the sale of said property shall exceed the [48] amount sufficient to satisfy said amounts in full, with interest as above set forth, then the balance is to be returned to said E. T. Barnette and Isabelle Barnette.

And it is further provided in said deeds that if, after applying the moneys received from the property and assets of said Washington-Alaska Bank and the sale of said properties mentioned in said deeds, and any moneys obtained from George Edgar Ward and W. B. Biggs on account of an option given to them upon the 18th day of November, 1909, to purchase an undivided 49/100 interest in and to said Mexican property for the sum of approximately \$225,000.00, there shall still remain a balance due said depositors and holders of unpaid drafts, the said E. T. Barnette and Isabelle Barnette promise and agree to pay said balance in full.

32.

That in said deed of the property situate in the Territory of Alaska the receivers and their successors are authorized and empowered to take possession of the same and to receive and collect the rents, royalties and issues thereof, and disburse the same to the depositors and holders of unpaid drafts, under the orders of this Court; and that, in the event the said E. T. Barnette and Isabelle Barnette and the said receivers or their successor shall deem it at any time advisable to sell any of said real estate situate in Alaska, that the same may be done by said receivers, and the proceeds derived from such sale disbursed to the depositors and holders of unpaid drafts, under the order of this Court.

33.

That the said receiver, plaintiff herein, holds a large amount of property belonging to said bank which is of great [49] value and has not been converted into money, and said property so held by him and the property so conveyed to the receivers by said E. T. Barnette and Isabelle Barnette are more than sufficient to satisfy all claims, demands and obligations of creditors of said Washington-Alaska Bank.

34.

That on the 29th day of March, 1911, the then receivers of the said Washington-Alaska Bank agreed to accept in full satisfaction of the liability of said E. T. Barnette to the creditors of said Washington-Alaska Bank the said deeds of said property upon the terms and conditions thereof and the said prom-

ises of the said E. T. Barnette and Isabelle Barnette therein, and the said E. T. Barnette and Isabelle Barnette made, executed, and delivered said deeds and made the said premises contained therein upon the distinct understanding and agreement that the same were in full satisfaction of all suits or causes of action then existing against said E. T. Barnette on account of any and all matters and things arising from his connection or management of the affairs of the said Fairbanks Banking Company, afterwards known as Washington-Alaska Bank, and in full satisfatcion of all liability of the said E. T. Barnette to the creditors of said Washington-Alaska Bank; and that said receivers accepted and received said promises and said deeds to said property upon order of this court in full satisfaction of all claims and causes of action of whatsoever nature that existed against the said E. T. Barnette for and on account of his management of the affairs of said bank from the 12th day of March, 1908, to the 4th day of January, 1911, and for and on account of his acts as president and as a director of said corporation. [50]

35.

That the receivers of said Washington-Alaska Bank, before the delivery and acceptance of said deeds hereinbefore mentioned, intended to, and if said agreement and deeds had not been made, executed and delivered to said receivers as hereinbefore stated, would have instituted an action against said E. T. Barnette to recover from said E. T. Barnette the amount of the dividend which was declared by said Fairbanks Banking Company upon the 12th day

of March, 1910, and which in the complaint in this action, in paragraph 4 thereof, is alleged to have been declared wrongfully and fraudulently.

36.

That the promises of said E. T. Barnette and Isabelle Barnette and the deeds to the property hereinbefore mentioned, were given by the said E. T. Barnette and Isabelle Barnette-upon the express understanding and agreement that the same were in full satisfaction of any liability of the said E. T. Barnette on account of the declaration of said dividend and in discharge of any causes of action against him for and on account thereof, and the same were accepted by the said receivers of said bank upon the distinct understanding that the same were in full satisfaction of the liability of the said E. T. Barnette to the creditors of said bank on account of the declaration of said dividend, and in full discharge of the said E. T. Barnette on any causes of action that might arise therefrom.

37.

That the receivers have received from the rents, royalties and issues of the property situate in the Territory of Alaska, the sum of \$31,400.00 in cash.

That the value of the property situate in the town of Fairbanks, Alaska, is the sum of \$25,000.

That the value of the mining property situate in the Fairbanks Recording District, Alaska, is the sum of \$20,000. [51]

That the value of the Mexican property cannot be definitely determined at this time, but the same is of great value, and was, at the time of the execution of

said deed, of the value of \$500,000.

38.

That the moneys received by the receivers from said properties and the value of the property conveyed by the said E. T. Barnette and Isabelle Barnette to the receivers as hereinbefore stated is more than ample to satisfy in full all the liability of the said E. T. Barnette and the directors and officers of said bank to said corporation for and on account of any acts, deeds, or wrongs done by them as such officers and directors, or otherwise.

As Conclusions of Law the Court finds:

Conclusions of Law.

1.

That said dividend was declared and paid out of the undivided profits of the Fairbanks Banking Company.

2.

That said defendants received said dividend honestly and in good faith believing that the same was declared and paid out of the undivided profits of said Fairbanks Banking Company, and they had no knowledge or notice that the same or any part thereof was declared and paid out of its capital stock.

3.

That there was a complete accord and satisfaction, as to all of the matters and things set forth in the complaint herein, had between E. T. Barnette and Isabelle Barnette and the former receivers of said Washington-Alaska Bank, and that by reason [52]

thereof all the matters and things charged in said complaint have been fully paid and satisfied.

4.

That the defendants are entitled *are entitled* to a judgment and decree that the plaintiff recover nothing by this action and that they have judgment for their costs and disbursements.

Which Findings of Fact and Conclusions of Law the Court refused to sign as the Findings of Fact and Conclusions of Law in the above-entitled cause; and, to the ruling of the Court in refusing to make the Findings of Fact as therein set forth and as requested by the defendants, the defendants then and there excepted separately to the refusal of the Court to make each, any and all of said requested findings, and an exception was then and there allowed by the Court to the refusal to make each, any and all thereof; and to the refusal of the Court to make the Conclusions of Law as requested by the defendants, or conclusions of similar import thereto, as set forth in paragraphs 1, 2, 3 and 4 of said proposed Conclusions of Law, the defendants then and there excepted, and a separate exception was allowed by the Court for the refusal to make each, any and all of the same.

That before the Findings of Fact and Conclusions of Law were signed in the above-entitled cause the defendant duly filed and presented to the Court their objections to the Findings of Fact and Conclusions of Law, as follows:

Defendants objected and excepted to that portion of Finding of Fact number 5 wherein it is stated

that the said Wood was at said time the owner of the shares of the capital stock of said company of the par value of \$250.00, and that there was paid to him thereon on said dividend the sum of \$500.00, for the reason that the same is not supported by the evidence offered on the trial of said cause and is contrary thereto; the evidence disclosing [53] that the said Wood was merely holding the said shares of stock in trust for one Joseph Conta, and that he received said dividend for the use and benefit of said Joseph Conta, and that the same was paid to the said Conta, and that the money was never paid to the said R. C. Wood; which objection was overruled by the Court and an exception then and there allowed by the Court to the defendants J. A. Jesson, Wood and McGinn for the overruling of the same.

Defendants objected to Finding of Fact number 6 for the reason that the same was contrary to the evidence given upon the trial of the above-entitled cause and is not supported by any evidence; evidence disclosing that at said time there was undivided profits out of which said dividend was declared and ordered paid; which objection was overruled by the Court, and an exception then and there allowed to said defendants Wood, McGinn and J. A. Jesson for the overruling of the same.

Said defendants objected to Finding of Fact number 6 and to that portion thereof wherein it is stated that the fact that said dividend was paid out of the capital of said bank was known to the defendants McGinn, Wood and J. A. Jesson, and each of them, at said time, or should have been known by them

by the exercise of reasonable diligence; for the reason that the same was not supported by the evidence given upon the trial of said cause, and is contrary thereto; the evidence disclosing undisputably that at the time of the declaration of said dividend the directors and officers of said bank honestly and in good faith believed that there were undivided profits out of which said dividend could be declared, and that the same was not an impairment of the capital stock of said corporation, and that said dividend was received by said directors of said institution in good faith and in the honest belief that said dividend was rightfully declared [54] and that they had a right to accept the same; which objection was overruled by the Court, and an exception then and there allowed by the Court to said defendants for the overruling of the same.

That said defendants Wood, McGinn and J. A. Jesson objected to Finding of Fact number 9 wherein it is stated that the amount of said liabilities is more than \$470,000 in excess of the value of said assets; for the reason that the same is not supported by the evidence given upon the trial of said cause, and is contrary thereto; the evidence disclosing that the present value of the assets of said bank is so uncertain and indefinite from the evidence introduced that the Court is not able to make a finding upon said question; which objection was overruled by the Court, and an exception then and there allowed the said defendants for the overruling of the same.

That the defendants objected to the Conclusions

of Law numbered 1, 2 and 3, for the reason that the same are contrary to the law, and not supported by the evidence given upon the trial of said cause; which objections were overruled by the Court, and an exception duly allowed said defendants Wood, McGinn and J. A. Jesson to the overruling of each and all of the same.

And now in furtherance of justice and that right may be done the said defendants Wood, McGinn and J. A. Jesson present the foregoing as their Bill of Exceptions in this case, and pray that the same may be settled and allowed, and signed and certified by the Judge of this Court in the manner provided by law; it having been stipulated and agreed between the attorney for the plaintiff and the attorneys for said defendants that the testimony set forth in the Bill of Exceptions in the case of F. G. Noyes, as receiver, vs. J. A. Jesson et al., number 1756, need not be set forth [55] herein, but that said testimony by reference is made a part of this Bill of Exceptions; it being also agreed that this cause be submitted upon the testimony set forth in said Bill of Exceptions at the same time that said cause number 1756 is argued, presented and submitted to the United States Circuit Court of Appeals for the Ninth Circuit.

McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. MCGINN,

Attorneys for said Defendants Wood, McGinn
and J. A. Jesson.

Service of the foregoing Bill of Exceptions by receipt of a copy thereof on this 19th day of September, 1914, is hereby admitted.

R. F. ROTH,
Attorney for Plaintiff. [56]

[Title of Court and Cause.]

Order Settling Bill of Exceptions.

BE IT REMEMBERED, that upon the 19th day of September, 1914, the defendants R. C. Wood, John L. McGinn and J. A. Jesson presented the foregoing Bill of Exceptions to the Court for settlement, which said proposed Bill of Exceptions was served and filed within the time allowed by the orders of this Court.

And it appearing to the Court from an examination of the proposed Bill of Exceptions that, as therein set forth, the Bill of Exceptions in the case of F. G. Noyes, as receiver, plaintiff, vs. J. A. Jesson et al., defendants, number 1756, contains all of the evidence, testimony and exhibits introduced and given upon the trial of this cause in support of and against the allegations and denials of the Complaint, Answers, Amended Answer, and Replies; and also all of the testimony, evidence and exhibits introduced and given upon the trial of this cause in support of and against the Further Separate and Affirmative Defense of said defendants, wherein it is alleged that there was complete accord and satisfaction between E. T. Barnette and Isabelle Barnette and the former receivers of said Washington-Alaska Bank as to all the matters and things

charged in the Complaint herein, and that there was a full settlement between the parties and a release of said Barnette from all the matters and things charged against him in the Complaint by reason thereof, and also contains all the evidence, testimony and exhibits introduced and given upon the [57] trial of said cause in support of, and against, the Further Separate and Affirmative Defense of the defendants, wherein it is alleged that said E. T. Barnette and Isabelle Barnette had fully paid and satisfied all of the wrongs and things alleged and charged against these defendants in the Complaint herein; as well as all of the proceedings not of record; and is in all respects true and correct.

Now, therefore, on motion,

IT IS HEREBY ORDERED: That the foregoing be, and the same is hereby, approved, allowed and settled as the Bill of Exceptions in the above-entitled cause, and made a part of the record herein; and that the same has been filed and presented within the time allowed by the orders of this Court.

AND IT IS FURTHER ORDERED: That the testimony and evidence introduced and received in said cause of F. G. Noyes, as receiver of the Washington-Alaska Bank, a Corporation, Plaintiff, vs. J. A. Jesson et al., Defendants, number 1756, and which said testimony and evidence is set forth in the Bill of Exceptions filed, settled and allowed in said cause number 1756, need not be set forth in the foregoing Bill of Exceptions in this cause, but that the same is by reference, upon stipulation of the at-

torneys for the respective parties, incorporated in and made a part of this Bill of Exceptions.

Done at Fairbanks, Alaska, this 19th day of September, 1914.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 13, page 22.

[Endorsed]: No. 1761. District Court, 4 Division, Territory of Alaska. F. G. Noyes, as Receiver, vs. John Zug et al. Bill of Exceptions.

Filed in the District Court, Territory of Alaska, 4th Div. Sep. 19, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [58]

[Title of Court and Cause.]

Assignments of Error.

Come now the above-named defendants John A. Jesson, R. C. Wood and John L. McGinn, and file the following assignments of error upon which they will rely on their appeal from the decree made by this Honorable Court upon the 6th day of July, 1914, in the above-entitled cause:

I.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 2 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the time said dividend was declared and paid, the said Fairbanks Banking Company had undivided profits amounting to said sum of \$33,720.00 and said dividend was declared and

paid out of the undivided profits of said bank. [59]

2.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 4 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows;

That the end of the fiscal year of the Washington-Alaska Bank and of the Fairbanks Banking Company was the 31st day of December of each year, and at said time it had been the custom and practice of said Washington-Alaska Bank and said Fairbanks Banking Company to charge off all debts due said banks that in the judgment of their officers was bad and uncollectible and which had not been charged off during said fiscal year.

3.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 5 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said bad debts due to the bank and so charged off were not after said time carried as an asset of said bank; and, after said bad debts had been deducted from the assets, any profits that were shown to exist, after the deduction of all liabilities including outstanding stock, were placed in the undivided profit account, and were so carried until the end of the next fiscal year unless a dividend was declared upon the same or bad debts charged against the same during the

next succeeding fiscal year. [60]

4.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 6 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the end of the fiscal year of 1909, R. C. Wood, who was then the president and manager of the First National Bank, and also acting as advisory manager of said Washington-Alaska Bank and Fairbanks Banking Company, requested George Wesch, then cashier of the Washington-Alaska Bank, to make a list of loans and discounts of said bank that he considered bad and uncollectible.

That said Wesch thereupon prepared a list of all the said loans and discounts due said bank that he considered bad and uncollectible, and presented the same to said R. C. Wood and thereupon the said Wood and Wesch went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of \$8,599.59.

That said loans and discounts due said bank were then and there, to wit, on December 31st, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were so charged off, there still remained undivided profits for the fiscal year ending December 31st, 1909, amounting to the sum of \$56,106.97.

5.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 7 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said George Wesch was and is a man of high standing in this community, a banker of experience, capable and honest, and well acquainted with the securities of said bank and the standing of its debtors.

6.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 8 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said R. C. Wood was a man of high standing in the community, the president of the First National Bank, a banker of experience, and well acquainted with the condition of said Washington-Alaska Bank, and the securities held by it for loans made by, and due to, said bank.

7.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 9 of the defendants' proposed Findings of Fact [61] and Conclusions of Law, and which is as follows:

That the said R. C. Wood, immediately after his appointment as advisory manager of said banks, prepared a record of all the loans and discounts of said Washington-Alaska Bank and said Fairbanks Banking Company, which said

record contained the names of the debtors, the amounts due the said Washington-Alaska Bank and Fairbanks Banking Company, and a description and the location of all property, real and personal, given to secure the loans made by said bank, which said record ever since the month of May, 1910, has been a record of said Fairbanks Banking Company, and is now in the possession of the receiver thereof.

8.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 10 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said record book so containing the names of the debtors of said Washington-Alaska Bank and the Fairbanks Banking Company, and a description and location of the properties given to secure said debts, although in the possession of the present receiver from the date of his appointment, was never examined by him, and the securities mentioned and described in said book given to secure loans were not known by him to be in existence.

9.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 11 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the end of the fiscal year 1909, the said R. C. Wood requested J. A. Jackson, cashier of the Fairbanks Banking Company, to make out

a list of loans and discounts of said Fairbanks Banking Company that he considered bad and uncollectible. That said Jackson thereupon prepared a list of all said loans and discounts that he considered bad and uncollectible and presented the same to said R. C. Wood, and thereupon the said Wood and Jackson went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of \$24,937.37.

That said loans and discounts due said bank were then and there, to wit, on December 31st, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were charged off, there still remained undivided profits for the fiscal year ending December 31, 1909, amounting to the sum of \$9,881.78. [62]

10.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 12 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said J. A. Jackson was and is a man of high standing in the community, a banker of experience, capable and honest, and well acquainted with the securities of said bank and the standing of its debtors.

11.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 12 of the defendants'

proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the meeting of the board of directors of said Fairbanks Banking Company held on January 12, 1910, statements of the condition of the said Washington-Alaska Bank of Washington and the Fairbanks Banking Company as of date December 31, 1909, after said bad debts hereinbefore mentioned had been charged off, were presented by the officers of said banks to said board of directors; and, after the same had been discussed and examined by said directors, the same were ordered filed. That said statements showed that the undivided profits of the Washington-Alaska Bank for the year ending December 31, 1909, after deducting what the officers of said bank regarded to be all of its bad loans and discounts, was the sum of \$56,106.97. That said statement showed that the undivided profits of the Fairbanks Banking Company for the year ending December 31, 1909, after deducting all the bad debts, was the sum of \$9,881.78.

12.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 14 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That upon the 12th day of April, 1910, the directors of the Washington-Alaska Bank declared a dividend of \$50,000.

13.

The Court erred in refusing to make the Finding

of Fact set forth in paragraph 15 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said dividend of the Washington-Alaska Bank of Washington, to wit, \$50,000, was paid to its stockholder the Fairbanks [63] Banking Company, \$25,000 of which said sum was ordered by the directors to be placed to the credit of the undivided profit account of said Fairbanks Banking Company, and the other \$25,000 was directed to be credited on the account for which said Fairbanks Banking Company was carrying the stock of said Washington-Alaska Bank.

14.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 16 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That after said sum of \$25,000 had been added to said undivided profit account of said Fairbanks Banking Company, the undivided profit account of said bank at said time amounted to the sum of \$34,828.55.

15.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 17 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the time of the declaration of said dividend, and after the adding of said sum of \$25,000 to the undivided profit account, the

books of said company showed that the undivided profit account amounted to the sum of \$34,828.55, and the directors at said time honestly and in good faith believed that the undivided profits of said Fairbanks Banking Company was said sum of \$34,828.55, and said directors were so advised by the officers of said bank.

16.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 18 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the profit of said Washington-Alaska Bank and Fairbanks Banking Company and First National Bank, for the year ending December 31, 1909, was the sum of \$131,332.91; and, after charging off bad debts on said three banks to the amount of \$42,836.96, the net profits of said three banks for said year was \$88,495.95.

17.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 19 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows: [64]

That the said Fairbanks Banking Company, at the time of the declaration of the dividend was carrying the stock of the Gold Bar Lumber Company for the sum of \$341,949, and said directors in good faith believed, and, from the reports of the officers of said Gold Bar Lumber Company, as well as from the reports of people of high standing who were acquainted with said

property and the value thereof, had a right to believe, that said property was worth said amount.

18.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 20 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the advancements made to the Tanana Electric Company by the Fairbanks Banking Company, for which two notes of the Tanana Electric Company were given to said bank amounting to the sum of \$27,997.38, were authorized and directed by the Scandinavian-American Bank of Seattle, State of Washington, and the said directors, at the time of the declaration of said dividend, believed and had a right to believe that the same was a good and valid claim against the said Scandinavian-American Bank, and a valuable asset of said Fairbanks Banking Company to the amount that the same was carried by them.

19.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 21 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said dividend was declared by said directors of said bank in good faith and in the honest belief, and after the exercise of due care, that the undivided profits of said bank amounted to the sum of \$34,828.55, and that the values

placed upon the assets of said bank was the true and correct one, and that the amount for which said bank was carrying its assets, and particularly its stocks, loans and discounts, were the true and correct valuation of the same.

20.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 22 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the dividend so paid to the stockholders, and which was received by the defendants answering in this case, was received by them without knowledge on their part that said bank did not have any surplus or undivided profits out of which said dividend could be declared or paid, or that the same was paid out of the capital of said bank; and they [65] and each of them received the same in good faith and in the honest belief that the same was declared and paid to them out of the surplus and undivided profits of said bank.

21.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 26 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That in the month of March, 1911, the then receivers of the Washington-Alaska Bank, formerly Fairbanks Banking Company, [66] intended to bring a suit or action in the District Court for the Territory of Alaska, Fourth Ju-

dicial Division, against E. T. Barnette, who had been the president of said Fairbanks Banking Company, and a director thereof, from the time of its organization as a corporation on March 12, 1908, until it closed its doors on January 4, 1911, and as such was active and influential in the management and control of said Fairbanks Banking Company.

22.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 27 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the time of the suspension of said bank, said E. T. Barnette was not within the Territory of Alaska, but shortly thereafter, and in the month of February, 1911, returned to Fairbanks, Alaska, and entered into negotiations with the creditors and depositors of said Washington-Alaska Bank, and with the then receivers of said bank, for the purpose of amicably adjusting all suits and causes of action that might exist against the said E. T. Barnette on account of his liability to the creditors of said bank on account of his management thereof from the time of its organization on the 12th day of March, 1908, until the 4th day of January, 1911.

23.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 28 of the defendants' proposed Findings of Fact and Conclusions of Law,

and which is as follows:

That as a result of said negotiations, and in full satisfaction of all liability of the said E. T. Barnette to the creditors of said Washington-Alaska Bank for and on account of the acts and wrongs done by him, if any, during said time that he was president and director thereof, the said E. T. Barnette and Isabelle Barnette, his wife, executed an instrument in writing in which the said E. T. Barnette admitted his liability to the creditors and depositors of said bank and promised and agreed to pay all of the depositors and holders of unpaid drafts of said bank in full any deficiency that might be found to exist upon the 18th day of December, 1914, between the amounts due said depositors and holders of unpaid drafts on the 4th day of January, 1911, with interest thereon at the rate of six per cent per annum from said 4th day of January, 1911, until the same should be paid, and the amount realized out of the property and assets of said Washington-Alaska Bank and paid to said depositors and holders of unpaid drafts. [67]

24.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 29 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said Isabelle Barnette was and is the wife of said E. T. Barnette, and the said Isabelle Barnette joined in said instrument in writing because of her desire to aid her said husband

in paying the creditors and depositors of said Washington-Alaska Bank.

25.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 30 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said promises were made on the distinct understanding and agreement that no litigation would be instituted against the said E. T. Barnette or any other person or persons jointly liable with him for any act or deed done by him during the time that he was president and director of said bank as aforesaid; and that, for the purpose of preventing any litigation, and as security for the faithful performance of the promises made by said E. T. Barnette and Isabelle Barnette, the said E. T. Barnette and Isabelle Barnette on the 18th day of March, 1911, with the knowledge, consent and approval of this Court, conveyed to the receivers of said bank, and the said receivers, by order of this Court, accepted a conveyance of title to an improved plantation containing 18,723 acres of land situated in the Republic of Mexico, and certain improved and income producing business property and lots situated in the incorporated town of Fairbanks, Territory of Alaska, and certain large interests in valuable association placer mining claims situated in the Fairbanks Precinct, Territory of Alaska; all of which property belonged, at the time of said

conveyances, to said E. T. Barnette and Isabelle Barnette, and were and are worth the sum of \$500,000, a sum greatly in excess of all the unpaid debts and liabilities of said bank.

26.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 31 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That in said deed of property situated in the Republic of Mexico, as well as in the deed to property situated in Alaska, it is expressly provided that if the depositors and holders of unpaid drafts are not paid in full by the 18th day of November, 1914, either out of the property and assets of said Washington-Alaska Bank, or otherwise, or by [68] the said E. T. Barnette and Isabelle Barnette, said receivers may sell all or any part of said land at private sale for the best possible prices obtainable; and that the moneys and funds derived from the sale of said properties shall then be paid to the depositors and owners of unpaid drafts in an amount sufficient to pay their claims and demands in full; and that, if the proceeds derived from the assets of said bank and the amounts realized from the sale of said properties shall be insufficient to pay said depositors and owners of unpaid drafts in full, then the same is to be disbursed amongst said depositors and owners of unpaid drafts pro rata; and that if the amount derived from the sale of said property shall exceed the amount

sufficient to satisfy said amounts in full, with interest as above set forth, then the balance is to be returned to said E. T. Barnette and Isabelle Barnette.

And it is further provided in said deeds that if, after applying the moneys received from the property and assets of said Washington-Alaska Bank and the sale of said properties mentioned in said deeds, and any moneys obtained from George Edgar Ward and W. B. Biggs on account of an option given to them upon the 18th day of November, 1909, to purchase an undivided 49/100 interest in and to said Mexican property for the sum of approximately \$225,000.00 there shall still remain a balance due said depositors and holders of unpaid drafts, the said E. T. Barnette and Isabelle Barnette promise and agree to pay said balance in full.

27.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 32 of defendant's proposed Findings of Fact and Conclusions of Law, and which is as follows:

That in said deed of the property situate in the Territory of Alaska, the receivers and their successors are authorized and empowered to take possession of the same and to receive and collect the rents, royalties and issues thereof, and disburse the same to the depositors and holders of unpaid drafts, under the orders of this Court and that, in the event the said E. T. Barnette

and Isabelle Barnette and the said receivers or their successors shall deem it at any time advisable to sell any of said real estate situate in Alaska, that the same may be done by said receivers, and the proceeds derived from such sale disbursed to the depositors and holders of unpaid drafts, under the order of this Court.

28.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 33 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said receiver, plaintiff herein, holds a large amount of property belonging to said bank, which is of great value [69] and has not been converted into money, and said property so held by him, and the property so conveyed to the receivers by said E. T. Barnette and Isabelle Barnette are more than sufficient to satisfy all the claims, demands and obligations of creditors of said Washington-Alaska Bank.

29.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 34 of defendants' proposed Finds of Fact and Conclusions of Law, and which is as follows:

That on the 29th day of March, 1911, the then receivers of the Washington-Alaska Bank agreed to accept in full satisfaction of the liability of said E. T. Barnette to the creditors of said Washington-Alaska Bank the said deeds of said property upon the terms and conditions thereof

and the said promises of the said E. T. Barnette and Isabelle Barnette therein, and the said E. T. Barnette and Isabelle Barnett made, executed and delivered said deeds and made the said promises contained therein upon the direct understanding and agreement that the same were in full satisfaction of all suits or causes of action then existing against said E. T. Barnette on account of any and all matters and things arising from his connection or management of the affairs of the said Fairbanks Banking Company, afterwards known as Washington-Alaska Bank, and in full satisfaction of all liability of the said E. T. Barnette to the creditors of said Washington-Alaska Bank; and that said receivers accepted and received said promises and said deeds to said property upon order of this Court in full satisfaction of all claims and causes of action of whatsoever nature that existed against the said E. T. Barnette for and on account of his management of the affairs of said bank from the 12th day of March, 1908, to the 4th day of January, 1911, and for and on account of his acts as president and as a director of said corporation.

30.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 35 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the receivers of said Washington-Alaska Bank, before the delivery and acceptance of said

deeds hereinbefore mentioned, intended to, and if said agreement and deeds had not been made, executed and delivered to said receivers as hereinbefore stated, would have instituted an action against said E. T. Barnette to recover from said E. T. Barnette the amount of the dividend which was declared by said Fairbanks Banking Company upon the 12th day of March, 1910, and which in the complaint in this action, in paragraph 4 thereof, is alleged to have been declared wrongfully and fraudulently. [70]

31.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 36 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the promises of said E. T. Barnette and Isabelle Barnette and the deeds to the property hereinbefore mentioned were given by the said E. T. Barnette and Isabelle Barnette upon the express understanding and agreement that the same were in full satisfaction of any liability of the said E. T. Barnette on account of the declaration of said dividend and in discharge of any causes of action against him for and on account thereof, and the same were accepted by the said receivers of said bank upon the distinct understanding that the same were in full satisfaction of the liability of the said E. T. Barnette to the creditors of said bank on account of the declaration of said dividend, and in full discharge of the said E. T. Barnette on any causes of action

that might arise therefrom.

32.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 37 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the receivers have received from the rents, royalties and issue of the property situate in the Territory of Alaska, the sum of \$31,400;

That the value of the property situate in the Town of Fairbanks, Alaska, is the sum of \$25,000;

That the value of the mining property situate in the Fairbanks Recording District, Alaska, is the sum of \$20,000;

That the value of the Mexican property cannot be definitely determined at this time, but the same is of great value, and was, at the time of the execution of said deed, of the value of \$500,000.

33.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 38 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the moneys received by the receivers from said properties and the value of the property conveyed by the said E. T. Barnette and Isabelle Barnette to the receivers as hereinbefore stated is more than ample to satisfy in full all of the liability of the said E. T. Barnette and the directors and officers of said bank to said corporation for

and on account of any acts, deeds or wrongs done by them as such officers and directors, or otherwise. [71]

34.

The Court erred in refusing to make and find as a conclusion of law what is set forth in paragraph 1 of Conclusions of Law in defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said dividend was declared and paid out of the undivided profits of the Fairbanks Banking Company.

35.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph 2 of Conclusions of Law in defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said defendants received said dividend honestly and in good faith believing that the same was declared and paid out of the undivided profits of said Fairbanks Banking Company, and they had no knowledge or notice that the same or any part thereof was declared and paid out of its capital stock.

36.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph 3 of Conclusions of Law in defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That there was a complete accord and satis-

faction, as to all of the matters and things set forth in the complaint herein, had between E. T. Barnette and Isabelle Barnette and the former receivers of said Washington-Alaska Bank, and that by reason thereof all the matters and things charged in said complaint have been fully paid and satisfied.

37.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph 4 of Conclusions of Law in defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the defendants are entitled to a judgment and decree that the plaintiff recover nothing by this action and that they have judgment for their costs and disbursements. [72]

38.

The Court erred in overruling defendants' objection to that portion of paragraph 5 of the Findings of Fact signed and filed in this cause, and in making the same, wherein it is stated that the said Wood was at said time the owner of shares of the capital stock of said company of the par value of \$2500.00, and that there was paid to him thereon on said dividend the sum of \$500.

39.

The Court erred in overruling the defendants' objection to Finding of Fact number 6, for the reason that the same is contrary to the evidence given upon the trial of said cause, and is not supported by any evidence.

40.

The Court erred in overruling the defendants' objection to that portion of Finding of Fact number 6, wherein it is stated that the fact that said dividend was paid out of the capital stock of said bank was known to defendants McGinn, Wood and J. A. Jesson, and each of them, at said time, or should have been known to them by the exercise of reasonable diligence.

41.

The Court erred in overruling the defendants' objection to that portion of Finding of Fact number 9, wherein it is stated that the amount of said liability is more than \$470,000.00 in excess of the value of said assets.

42.

The Court erred in overruling the defendants' objection to the Conclusion of Law number 1 of the Conclusions of Law signed and filed in this cause, and in making the same, which is as follows:

That the defendant J. A. Jesson is liable to plaintiff by reason of the payment to him of said dividend in the sum of \$2,000 [73]

43.

The Court erred in overruling the defendants' objection to Conclusion of Law number 2 of the Conclusions of Law signed and filed in this cause, and in making the same, which is as follows:

That the defendant John L. McGinn is liable to plaintiff, by reason of the payment to him of said dividend, in the sum of \$2,000.

44.

The Court erred in overruling the defendants' objection to Conclusion of Law number 3 of the Conclusions of Law signed and filed in this cause, and in making the same, which is as follows:

That the defendant R. C. Wood is liable to plaintiff, by reason of the payment to him of said dividend, in the sum of \$500.

45.

The Court erred in ordering and directing that a decree be entered in accordance with said Conclusions of Law.

46.

The Court erred in entering judgment and decree in favor of the plaintiff and against the defendants John A. Jesson for the sum of \$2,000.

47.

The Court erred in entering judgment and decree in favor of the plaintiff and against the defendant John L. McGinn for the sum of \$2,000.

48.

The Court erred in entering judgment and decree in favor of the plaintiff and against the defendant R. C. Wood for the sum of \$500.

49.

The Court erred in ordering and adjudging that the plaintiff have and recover costs from the defendants John A. Jesson, John L. McGinn and R. C. Wood. [74]

50.

The Court erred in making, rendering and entering a decree to the effect that execution issue for the

enforcement of the above judgment and decree against the defendants R. C. Wood, J. A. Jesson and John L. McGinn.

51.

The Court erred in making, rendering and entering a decree in favor of the defendants J. A. Jesson, R. C. Wood and John L. McGinn, and against the plaintiff, to the effect that plaintiff take nothing in this action, and that the defendants recover their costs and disbursements.

52.

The Court erred in refusing to make a finding that all the matters and things charged in the complaint were fully compromised and settled by the accord and satisfaction that was entered into between E. T. Barnette and Isabelle Barnette and the former receivers of said corporation.

53.

The Court erred in failing to make a Finding of Fact to the effect that all the wrongs charged in the complaint have been fully paid and satisfied by the said E. T. Barnette and Isabelle Barnette.

54.

The Court erred in failing to make a Finding of Fact to the effect that all the matters and things found against these defendants have been fully paid and satisfied by the said E. T. Barnette and Isabelle Barnette.

WHEREFORE, these defendants pray that the judgment and decree of said Court be vacated and set aside, and that judgment and decree be entered in favor of the defendants to the effect that the plain-

tiff recover nothing in this action and that said [75]
defendants do recover their costs and disbursements,
and that they have such other and further relief as
in accordance with the law they are entitled to re-
ceive.

McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. McGINN,

Attorneys for Defendants J. A. Jesson, R. C. Wood
and John L. McGinn.

Service of a true copy of the within Assignments
of Error at Fairbanks, Alaska, September 19th, 1914,
is hereby admitted.

R. F. ROTH,
Attorney for Plaintiff.

[Endorsed]: 1761. District Court, 4 Division,
Territory of Alaska, F. G. Noyes, as Receiver, vs
John Zug et al. Assignments of Error.

Filed in the District Court, Territory of Alaska,
4th Div. Sep. 19, 1914. Angus McBride, Clerk.
By P. R. Wagner, Deputy. [76]

[Title of Court and Cause.]

**Petition for the Allowance of Appeal and Order
Allowing the Same.**

The above-named defendants R. C. Wood, John
L. McGinn and J. A. Jesson, conceiving themselves
aggrieved by the order, judgment and decree made
and entered in the above-entitled court and cause
on the 6th day of July, 1914, wherein it was adjudged
and decreed that the plaintiff have and recover of

and from the defendant J. A. Jesson the sum of two thousand dollars; that the plaintiff have and recover of and from the defendant R. C. Wood the sum of Five Hundred Dollars, and that the plaintiff have and recover of and from the defendant John L. McGinn the sum of Two Thousand Dollars; and that the plaintiff have and recover costs from the defendants R. C. Wood, John L. McGinn and J. A. Jesson; and that execution issue for the enforcement of said judgment, do hereby appeal from said order, judgment and decree made and entered on the 6th day of July, 1914, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons [77] specified in the Assignment of Errors filed herein; and they pray that this appeal may be allowed, and that the transcript of the record, papers and proceedings upon which said judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and they pray that the Court fix the amount of the security which the defendant R. C. Wood shall give and furnish upon such appeal and that upon the giving of such security all further proceedings in this court be suspended and stayed as against the said R. C. Wood until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit; and that the Court also make an order fixing the amount of security which the defendant John L. McGinn shall give and furnish upon such appeal, and that upon the giving of such security all further proceedings in this court as to him be suspended and stayed until the deter-

mination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit; and that the Court fix the amount of the cost bond on appeal.

McGOWAN & CLARK,

A. R. HEILIG,

JOHN L. McGINN,

Attorneys for Defendants R. C. Wood, John L. McGinn and J. A. Jesson.

Service of the foregoing petition for allowance of appeal is hereby admitted at Fairbanks, Alaska, this 19th day of September, 1914, by receipt of a copy thereof.

R. F. ROTH,

Attorney for Plaintiff.

The foregoing petition for appeal is hereby granted.

Done at Fairbanks, Alaska, this 19th day of September, 1914.

F. E. FULLER,

District Judge.

Entered in Court Journal No. 13, page 23. [78]

We hereby certify that the foregoing is a full and true copy of the petition for the allowance of an appeal herein.

McGOWAN & CLARK,

A. R. HEILIG and

JOHN L. McGINN,

Attorneys for Defendants Wood, McGinn and J. A. Jesson.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 19, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [79]

At a stated term, to wit, the regular October 1913 term, of the District Court of the Territory of Alaska, Fourth Judicial Division, held at the courtroom in the Town of Fairbanks, Territory of Alaska, in said Fourth Division. on the 19th day of September, 1914. Present, the Honorable F. E. FULLER, Judge of the District Court of the Territory of Alaska, Fourth Division, sitting in equity.

[Title of Cause.]

Order Allowing Appeal [and Fixing Amount of Bond].

On motion of Messrs. McGowan & Clark, A. R. Heilig and John L. McGinn, attorneys for defendants R. C. Wood, John L. McGinn and J. A. Jesson,

IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree heretofore filed and entered herein against the defendants R. C. Wood, John L. McGinn and J. A. Jesson, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals. [80]

IT IS FURTHER ORDERED that the bond on appeal as to the defendant R. C. Wood be fixed at the sum of one thousand dollars, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal; and that as to the defendant John L. McGinn the bond on appeal be fixed at the sum of three thousand dollars, the same to act as a

supersedeas bond and also as a bond for costs and damages on appeal; and that as to the other defendant the cost bond on appeal be fixed at the sum of five hundred dollars, the same to be included in the amount of bond that is to be given by the said defendants Wood and McGinn.

Dated at Fairbanks, Alaska, this 19th day of September, 1914.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 13, page 23.

Service of the within order allowing appeal, by receipt of a true copy thereof at Fairbanks, Alaska, September 19th, 1914, is hereby admitted.

R. F. ROTH,
Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 19, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [81]

[Title of Court and Cause.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That I, John L. McGinn, as principal, and E. W. Griffin and W. Casey, as sureties, are held and firmly bound unto F. G. Noyes, as receiver of the Washington-Alaska Bank, a corporation, the plaintiff herein, in the full sum of three thousand dollars, to be paid to the said F. G. Noyes, as receiver of the said Washington-Alaska Bank, a corporation, plaintiff herein, his attorneys, executors, administrators, assigns, successor or successors, to which payment well

and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of September, A. D. 1914.

WHEREAS lately at a term of the District Court for the Territory of Alaska, Fourth Division, in a suit pending in said Court between F. G. Noyes, as receiver of the Washington-Alaska Bank, a corporation, organized under the laws of the State of Nevada, as plaintiff, and John Zug, Jas. W. Hill, John L. McGinn, [82] Dave Yarnell, David Petree, L. T. Erwin, R. C. Wood, G. A. Coleman, Jesson Brothers, a copartnership composed of L. N. Jesson, J. A. Jesson and E. R. Jesson, also L. N. Jesson, J. A. Jesson, and E. R. Jesson as individuals, J. L. Sale, A. T. Smith, J. A. Healey, G. W. Palmer, Mrs. Mary Anderson, Margaret Hally, S. Dockham, M. F. Hall, Violet Gaustad, Mrs. Anna C. Sullivan, John P. Anderson, John E. Holmgren, John Flygar, B. R. Dusenbury, Annie B. Claypool, S. E. & Robert Shephard, copartners doing business as Shephard Brothers, H. C. C. Baldry, John Parsons, Lucy Parsons, W. E. Baldry, Chas. Frey, Paul Fisher, Hans Stark, Geo. Preston, Dan Ryan, Susie Kotsch, and Clara Marks, as defendants, a decree was rendered against the defendant, John L. McGinn, for the sum of two thousand dollars and costs; and defendants J. A. Jesson, R. C. Wood and John L. McGinn have obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals to reverse the decree of the aforesaid suit, and a citation

directed to said plaintiff F. G. Noyes, as receiver of the Washington-Alaska Bank, a corporation, is about to be issued citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden in San Francisco, California;

AND WHEREAS the above-named defendant John L. McGinn has obtained an order from said Court that the bond on appeal as to him be fixed in the sum of Three Thousand Dollars, the same to act as a supersedeas bond as to him, and also as a bond for costs and damages on appeal.

Now, the condition of the above obligation is such that if the said John L. McGinn shall prosecute his said appeal to effect, and shall answer all damages and costs that may be awarded against him, if he fails to make his plea good, then this [83] obligation is to be void; otherwise to remain in full force and virtue.

JOHN L. MCGINN,
Principal.

E. W. GRIFFIN,
Surety.

W. CASEY.
Surety.

United States of America,
Territory of Alaska,—ss.

E. W. Griffin and William Casey, whose names are subscribed to the above and foregoing undertaking as sureties, being first duly sworn, each for himself doth depose and say: That he is a resident of the Territory of Alaska; That he is not an attorney or

counsellor at law, marshal, clerk of any court, or other officer of any court; That he is worth the sum of Three Thousand Dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

E. W. GRIFFIN.

W. CASEY.

Subscribed and sworn to before me this 19 day of September, 1914.

[Seal]

E. T. WOLCOTT,

A Notary Public for Territory of Alaska.

My Commission will expire May 10, 1917.

The sufficiency of the sureties on the foregoing bond approved this 19th day of September, 1914.

F. E. FULLER,

District Judge.

[Endorsed]: No. 1761. District Court, 4 Div. Alaska. F. G. Noyes, as Receiver, vs. John Zug, et al. Bond on Appeal (John L. McGinn).

Filed in the District Court, Territory of Alaska, 4th Div. Sep. 19, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [84]

[Title of Court and Cause.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That I, R. C. Wood as principal, and George Hutchinson and E. R. Peoples, as sureties, are held and firmly bound unto F. G. Noyes, as receiver of the Washington-Alaska Bank, a corporation, the plaintiff herein, in the full sum of one thousand dollars, to be paid to the said F. G. Noyes, as receiver of the

said Washington-Alaska Bank, a corporation, plaintiff herein, his attorneys, executors, administrators, assigns, successor or successors, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of September, A. D. 1914.

WHEREAS lately at a term of the District Court for the Territory of Alaska, Fourth Division, in a suit pending in said Court between F. G. Noyes, as receiver of the Washington-Alaska Bank, a corporation, organized under the laws of the State of Nevada, as plaintiff, and John Zug, Jas. W. Hill, John L. McGinn, [85] Dave Yarnell, David Petree, L. T. Erwin, R. C. Wood, G. A. Coleman, Jesson Brothers, a copartnership composed of L. N. Jesson, J. A. Jesson and E. R. Jesson, also L. N. Jesson, J. A. Jesson, and E. R. Jesson as individuals, J. L. Sale, A. T. Smith, J. A. Healey, G. W. Palmer, Mrs. Mary Anderson, Margaret Hally, S. Dockham, M. F. Hall, Violet Gaustad, Mrs. Anna C. Sullivan, John P. Anderson, John E. Holmgren, John Flygar, B. R. Dusenbury, Annie B. Claypool, S. E. & Robert Shephard, copartners doing business as Shephard Brothers, H. C. C. Baldry, John Parsons, Lucy Parsons, W. E. Baldry, Chas. Frey, Paul Fisher, Hans Stark, Geo. Preston, Dan Ryan, Susie Kotsch, and Clara Marks, as defendants, a decree was rendered against the defendant R. C. Wood, for the sum of five hundred dollars and costs; and defendants J. A. Jesson, R. C. Wood and John L. McGinn have ob-

tained from said Court an order allowing an appeal to the United States Circuit Court of Appeals to reverse the decree of the aforesaid suit, and a citation directed to said plaintiff F. G. Noyes, as receiver of the Washington-Alaska Bank, a corporation, is about to be issued citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden in San Francisco, California;

AND WHEREAS, the above-named defendant R. C. Wood has obtained an order from said Court that the bond on appeal as to him be fixed in the sum of One Thousand Dollars, the same to act as a supersedeas bond as to him, and also as a bond for costs and damages on appeal.

Now, the condition of the above obligation is such that if the said R. C. Wood shall prosecute his said appeal to effect, and shall answer all damages and costs that may be awarded against him, if he fails to make his plea good, then this [86] obligation is to be void; otherwise to remain in full force and virtue.

R. C. WOOD,

By J. L. McGINN, Attorney,
Principal.

GEO. HUTCHINSON,
Surety.

E. R. PEOPLES,
Surety.

United States of America,
Territory of Alaska,—ss.

George Hutchinson and E. R. Peoples, whose

names are subscribed to the above and foregoing undertaking as sureties, being first duly sworn, each for himself doth depose and say : That he is a resident of the Territory of Alaska ; that he is not an attorney or counsellor at law, marshal, clerk of any court, or other officer of any court ; that he is worth the sum of Two Thousand Dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

GEO. HUTCHINSON,
E. R. PEOPLES.

Subscribed and sworn to before me this 19 day of September, 1914.

[Seal]

E. T. WOLCOTT,

A Notary Public for Territory of Alaska.

My Commission will expire May 10, 1917.

The sufficiency of the sureties on the foregoing bond approved this 19th day of September, 1914.

F. E. FULLER,
District Judge.

[Endorsed]: No. 1761. District Court, 4 Div. Alaska. F. G. Noyes, Receiver, vs. John Zug et al. Bond on Appeal. (R. C. Wood.)

Filed in the District Court, Territory of Alaska, 4th Div. Sep. 19, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [87]

[Title of Court and Cause.]

Citation [on Appeal].

United States of America,

Territory of Alaska,—ss.

The President of the United States of America. To

F. G. Noyes, as Receiver of the Washington-Alaska Bank, a Corporation, Plaintiff:

YOU ARE HEREBY CITED AND ADMONISHED to appear and be at the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof, pursuant to an order allowing an appeal, made and entered in the above-entitled cause in which F. G. Noyes, as receiver of the Washington-Alaska Bank, a corporation, is plaintiff and respondent, and John Zug, Jas. W. Hill, John L. McGinn, Dave Yarnell, David Petree, L. T. Erwin, R. C. Wood, G. A. Coleman, Jesson Brothers, a copartnership composed of L. N. Jesson J. A. Jesson and E. R. Jesson, also L. N. Jesson, J. A. Jesson and E. R. Jesson, as individuals, J. L. Sale, A. T. Smith, J. A. Healey, G. W. Palmer, Mrs. Mary Anderson, [88] Margaret Hally, S. Dockman, M. F. Hall, Violet Gausted, Mrs. Annie C. Sullivan, John P. Anderson, John E. Holmgren, John Flygar, B. R. Dusenbury, Annie B. Claypool, S. E. & Robert Shephard, copartners doing business as Shephard Brothers, H. C. C. Baldry, John Parsons, Lucy Parsons, W. E. Baldry, Chas. Frey, Paul Fisher, Hans Stark, Geo. Preston, Dan Ryan, Susie Kotzch and Clara Marks are defendants, and said defendants R. C. Wood, John L. McGinn

and J. A. Jesson are appellants in said appeal, to show cause, if any there be, why a decree and judgment rendered in said cause in said District Court for the Territory of Alaska, Fourth Division, against the defendants R. C. Wood, John L. McGinn and J. A. Jesson, and each of them, should not be set aside, corrected and reversed, and why speedy justice should not be done to the defendants R. C. Wood, John L. McGinn and J. A. Jesson.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States this 19th day of September, one thousand nine hundred and fourteen.

F. E. FULLER,

District Judge in and for the Territory of Alaska,
Fourth Judicial Division.

[Seal]

Attest: ANGUS McBRIDE,

Clerk.

Service of a copy of the within and foregoing Citation admitted this 19 day of September, 1914, at Fairbanks, Alaska.

R. F. ROTH,

Attorney for Plaintiff and Respondent. [89]

[Title of Court and Cause.]

Stipulation Extending Return Day.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys herein that, owing to the great distance between Fairbanks, Alaska, and San Francisco, California, and the uncertainty of mail, that the time for docketing this appeal be, and the same is hereby, extended to and

including the 1st day of January, 1915.

Dated Fairbanks, Alaska, September 19th, 1914.

R. F. ROTH,

Attorney for Plaintiff.

McGOWAN & CLARK,

A. R. HEILIG, and

JOHN L. McGINN,

Attorneys for Defendants Wood, McGinn and J. A. Jesson.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 19, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [90]

[Title of Court and Cause.]

Order Extending Return Day.

It having been stipulated and agreed by and between the parties hereto through their respective attorneys that the return day and the time for docketing the appeal in this action may be extended to and including the 1st day of January, 1915, on account of the great distance of Fairbanks, Alaska, from San Francisco, California, and the uncertainty of mail.

Now, therefore, it is hereby

ORDERED that the return day and the time for docketing said cause be extended to and including the 1st day of January, 1915.

Dated at Fairbanks, Alaska, this 19th day of September, 1914.

F. E. FULLER,

District Judge.

Entered in Court Journal No. 13, page 23.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 19, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [91]

[Title of Court and Cause.]

[Stipulation re Transcript of Record on Appeal.]

IT IS HEREBY STIPULATED between the plaintiff and the defendants Wood, McGinn and J. A. Jesson et al., by and through their respective attorneys, that the transcript of record on appeal in the above-entitled cause shall be made up of the following papers;

Complaint;

Amended Answer of J. A. Jesson, John L. McGinn and R. C. Wood;

Reply to said Answer;

Findings of Fact and Conclusions of Law;

Judgment and Decree;

Bill of Exceptions;

Order Settling Bill of Exceptions;

Assignments of Error;

Petition for Appeal;

Order Allowing Appeal;

Bonds on Appeal;

Citation, and Admission of Service Thereon;

Stipulation Extending the Return Day and Time for Docketing said Cause on Appeal;

Order Extending Return Day and Time for Docketing said cause on Appeal;

Stipulation for Printing of Transcript;

Stipulation as to Record on Appeal;

Praeceptum for Transcript; and [92]

This Stipulation as to Making up or Record.

Done at Fairbanks, Alaska, September 19, 1914.

R. F. ROTH,

Attorney for Plaintiff.

McGOWAN & CLARK,

A. R. HEILIG,

JOHN L. McGINN,

Attorneys for Defendants Wood, McGinn and J. A. Jesson.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 19, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [93]

[Title of Court and Cause.]

Stipulation as to Record on Appeal.

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and defendants, that the Bill of Exceptions contained in the transcript on appeal in the case of F. G. Noyes, Receiver, etc., vs. J. A. Jesson, et al., No. 1756, may be used as the Bill of Exceptions on Appeal in this cause without the necessity of printing the same separately;

And it is further stipulated and agreed that this cause may be submitted to the Circuit Court of Appeals for the Ninth Circuit upon said Bill of Exceptions at the same time that said cause No. 1766 is submitted to said Court.

Dated at Iditarod, Alaska, this 6th day of July, 1914.

O. L. RIDER,

Attorney for Plaintiff.

McGOWAN & CLARK,

JOHN L. McGINN,

Attorney for Wood, McGinn and J. A. Jesson.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 19, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [94]

[Title of Court and Cause.]

Stipulation as to Printing of the Record.

IT IS HEREBY STIPULATED AND AGREED that in the printing of the record herein for the consideration of the Court on appeal that the title of the court and cause in full on all of the pages shall be omitted except on the first page, and inserted in lieu thereof "Title of Court and Cause."

Dated, Fairbanks, Alaska, September 19, 1914.

R. F. ROTH,

Attorney for Plaintiff.

McGOWAN & CLARK,

A. R. HEILIG and

JOHN L. McGINN,

Attorneys for Defendants, Wood, McGinn and J. A. Jesson.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 19, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [95]

[Certificate of Clerk U. S. District Court to
Transcript of Record.]

*In the District Court for the Territory of Alaska, 4th
Division.*

No. 1761.

F. G. NOYES, as Receiver, etc.,

Plaintiff,

vs.

JOHN ZUG et al.,

Defendants.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, Angus McBride, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of ninety-five (95) typewritten pages, numbered from 1 to 95 inclusive, constitutes a full, true and correct transcript on appeal in cause No. 1761, entitled: F. G. Noyes, as Receiver of the Washington-Alaska Bank, a corporation, organized under the laws of the State of Nevada, Plaintiff, vs. John Zug, Jas. W. Hill, John L. McGinn, Dave Yarnell, David Petree, L. T. Erwin, R. C. Wood, G. A. Coleman, Jesson Brothers, a copartnership composed of L. N. Jesson, J. A. Jesson, and E. R. Jesson, also L. N. Jesson, J. A. Jesson and E. R. Jesson, as individuals, J. L. Sale, A. T. Smith, J. A. Healy, G. W. Palmer, Mrs Mary Anderson, Margaret Hally, S. Dockham, M. F. Hall, Violet Gaustad, Mrs. Anna C. Sullivan, John P. Anderson,

John E. Holmgren, John Flygar, B. R. Dusenbury, Annie B. Claypool, S. E. & Robert Shephard, copartners doing business as Shephard Bros., H. G. C. Baldry, John Parsons, Lucy Parsons, W. E. Baldry, Chas. Frey, Paul Fisher, Hans Stark, Geo. Preston, Dan Ryan, Susie Kotzch and Clara Marks, Defendants, wherein F. G. Noyes, as Receiver of the Washington-Alaska Bank, a corporation, is Plaintiff and Appellee, and John Zug, Jas. W. Hill, John L. McGinn, Dave Yarnell, David Petree, L. T. Erwin, R. C. Wood, G. A. Coleman, Jesson Brothers, a copartnership composed of L. N. Jesson, J. A. Jesson, and E. R. Jesson, also L. N. [96] Jesson, J. A. Jesson and E. R. Jesson, as individuals, J. L. Sale, A. T. Smith, J. A. Healey, G. W. Palmer, Mrs. Mary Anderson, Margaret Hally, S Dockham, M. F. Hall, Violet Gaustad, Mrs. Anna C. Sullivan, John P. Anderson, John E. Holmgren, John Flygar, B. R. Dusenbury, Annie B. Claypool, S. E. & Robert Shephard, copartners doing business as Shephard Bros., H. G. C. Baldry, John Parsons, Lucy Parsons, W. E. Baldry, Chas. Frey, Paul Fisher, Hans Stark, Geo. Preston, Dan Ryan, Susie Kotzch and Clara Marks are defendants and appellants, and was made pursuant to and in accordance with the praecipe of the defendants and appellants filed in this action and made a part of this transcript, and by virtue of the citation issued in said cause, and is the return thereof in accordance therewith.

And I do further certify that the original Citation is included in said transcript, and that the index thereof, is a correct index of said transcript on ap-

peal; also that the costs of preparing said transcript and this certificate, amounting to thirty-seven and 50/100 dollars (\$37.50), have been paid to me by counsel for defendants and appellants.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said court, at Fairbanks, Alaska, this 27th day of November, 1914.

[Seal] ANGUS McBRIDE,
Clerk District Court, Territory of Alaska, Fourth
Division. [97]

[Endorsed]: No. 2529. United States Circuit Court of Appeals for the Ninth Circuit. R. C. Wood, John L. McGinn and J. A. Jesson, Appellants, vs. F. G. Noyes, as Receiver of the Washington-Alaska Bank, a Corporation, Organized Under the Laws of the State of Nevada, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Fourth Division.

Received Dec. 15, 1914.

F. D. MONCKTON,
Clerk.

Filed Dec. 21, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals,
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk. [98]

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

R. C. WOOD, JOHN L. MCGINN and JOHN A. JESSON,
Appellants,

vs.

F. G. NOYES, as Receiver of the Washington-Alaska Bank,
a corporation, organized under the Laws of the State of
Nevada,
Appellee.

BRIEF OF APPELLANTS.

McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. MCGINN,
Attorneys for Appellants.

METSON, DREW & MACKENZIE,
CURTIS HILLYER,
CHARLES J. HEGGERTY,
Of Counsel.

Filed this.....day of May, A. D. 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The James H. Barry Co.
San Francisco

Filed

MAY 7 - 1917

F. D. Monckton.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

R. C. WOOD, JOHN L. MCGINN and
JOHN A. JESSON,

Appellants,

vs.

F. G. NOYES, as Receiver of the
WASHINGTON-ALASKA BANK,
a Corporation, Organized under the
Laws of the State of Nevada,

Appellee.

No. 2529

BRIEF OF APPELLANTS.

This was an action brought by F. G. Noyes, as receiver of the Washington-Alaska Bank, to recover from various stockholders of the corporation the amount of money which they had severally received by reason of a declaration and payment of a dividend upon the capital stock, said dividend amounting to twenty per cent. (20%), or \$20.00 per share on its then outstanding capital stock of \$168,800.00.

It was alleged in the complaint that on and for a long time prior to April 12, 1910, said Washington-Alaska Bank, then known as the Fairbanks Banking Company, was in a grossly insolvent and bankrupt condition (p. 4), and its assets were insufficient in value by more than \$200,000.00 to pay its deposits and other liabilities (p. 10); that notwithstanding said grossly insolvent and bankrupt condition of said bank, the board of directors did on said 12th day of April, 1910, wrongfully and fraudulently declare and ordered to be paid the dividend aforesaid to the then stockholders of said bank (p. 6), and that on said 12th day of April, 1910, said Washington-Alaska Bank owed to depositors the sum of \$867,972.28, and had other liabilities amounting to \$83,717.53 (p. 6).

The amended answer of the defendants appearing denies that the bank was insolvent or the dividend fraudulent (p. 15) or that defendant Wood received any dividend for or on account of any stock. Defendant Wood further sets up that the dividend declared and paid to him was paid to him for the use and benefit of Joseph Conta, who was the true owner of the shares of stock standing in the name of said Wood (p. 18); and that at the time the dividend was declared and he received the same, the bank was solvent, and the defendant Wood believed it so to be, and received said dividend in good faith and in the honest belief that said bank was solvent, and said Wood paid to said Conta the amount of said divi-

dend so received by him prior to any notice that said bank was insolvent and could not meet its liabilities (p. 19).

The defendants further set up that E. T. Barnette was the president and a director of said Washington-Alaska Bank (pp. 21, 22).

That the bank closed its doors on January 4, 1911, and receivers were appointed (p. 21);

That the receivers intended to bring an action against Barnette, who was at that time out of the Territory of Alaska (pp. 21-22);

That Barnette shortly afterward returned and negotiated with the receivers for the purpose of amicably adjusting all suits and causes of action that might exist against him on account of his liability to the creditors of the bank and on account of his management thereof from the time of its organization on the 12th day of March, 1908, until the 4th day of January, 1911 (p. 22);

That as a result of said negotiations and in full satisfaction of the liability of said Barnette, he and his wife executed an instrument in writing by which Barnette admitted his liability and promised and agreed to pay all the depositors and holders of unpaid drafts in full to the amount of any deficiency that might be found to exist on the 8th day of November, 1914 (p. 22);

That the promises were made on the distinct understanding and agreement that no litigation would

be instituted against Barnette for any act done by him while president and director; that to secure the performance of the promises made by Barnette and his wife they conveyed to the receivers with the knowledge, consent and approval of the Court, properties in Mexico and Alaska which were worth over the sum of \$600,000 (pp. 23-24) ;

That the receivers accepted and received the promises and deeds to said property in full satisfaction of all claims of whatsoever nature that existed against the said Barnette on account of his management of the affairs of said bank and on account of his acts as president and director of said corporation (p. 26) ;

That the promises of Barnette and his wife and the deeds were given upon the understanding and agreement that they were in full satisfaction of any liability of Barnette on account of the declaration of the dividend and in discharge of any causes of action against him on account thereof and they were accepted by the receivers of said bank upon the understanding that they were in full satisfaction of the liability of said Barnette to the creditors of said bank (p. 27) ;

That the receivers have received from the rents and issues of the Alaska property \$31,400 in cash; that the value of the property conveyed to them in Alaska, in Fairbanks is \$25,000; the value of the mining property situate in Fairbanks Recording District is \$20,000 and the value of the Mexican property could not be definitely determined at that time but that it was of

great value and was at the time of the execution of the deed of the value of \$500,000 (p. 28) and

That the receivers have received full and complete satisfaction of any and all claims for and on account of the declaration and payment of the dividend made by the Fairbanks Banking Company (p. 28).

ASSIGNMENT OF ERRORS.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 2 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the time said dividend was declared and paid, the said Fairbanks Banking Company had undivided profits amounting to said sum of \$33,720.00 and said dividend was declared and paid out of the undivided profits of said bank.

Assignment of Error No. 1.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 4 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the end of the fiscal year of the Washington-Alaska Bank and of the Fairbanks Banking Company was the 31st day of December of each year, and at said time it had been the custom and practice of said Washington-Alaska Bank and said Fairbanks Banking Company to charge off all debts due said banks that in the judgment of their

officers was bad and uncollectible and which had not been charged off during said fiscal year.

Assignment of Error No. 2.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 5 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said bad debts due to the bank and so charged off were not after said time carried as an asset of said bank; and, after said bad debts had been deducted from the assets, any profits that were shown to exist, after the deduction of all liabilities including outstanding stock, were placed in the undivided profit account, and were so carried until the end of the next fiscal year unless a dividend was declared upon the same or bad debts charged against the same during the next succeeding fiscal year.

Assignment of Error No. 3.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 6 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the end of the fiscal year of 1909, R. C. Wood, who was then the president and manager of the First National Bank, and also acting as advisory manager of said Washington-Alaska Bank and Fairbanks Banking Company, requested George Wesch, then cashier of the Washington-Alaska Bank, to make a list of loans and discounts of said bank that he considered bad and uncollectible.

That said Wesch thereupon prepared a list of all the said loans and discounts due said bank that he considered bad and uncollectible, and presented the same to said R. C. Wood and thereupon the said Wood and Wesch went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of \$8,599.59.

That said loans and discounts due said bank were then and there, to wit, on December 31st, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were so charged off, there still remained undivided profits for the fiscal year ending December 31st, 1909, amounting to the sum of \$56,106.97.

Assignment of Error No. 4.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 7 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said George Wesch was and is a man of high standing in this community, a banker of experience, capable and honest, and well acquainted with the securities of said bank and the standing of its debtors.

Assignment of Error No. 5.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 8 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said R. C. Wood was a man of high

standing in the community, the president of the First National Bank, a banker of experience, and well acquainted with the condition of said Washington-Alaska Bank, and the securities held by it for loans made by, and due to, said bank.

Assignment of Error No. 6.

The Court erred in refusing to make the Finding of Fact set forth in paragraph II of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the end of the fiscal year 1909, the said R. C. Wood requested J. A. Jackson, cashier of the Fairbanks Banking Company, to make out a list of loans and discounts of said Fairbanks Banking Company that he considered bad and uncollectible. That said Jackson thereupon prepared a list of all said loans and discounts that he considered bad and uncollectible and presented the same to said R. C. Wood, and thereupon the said Wood and Jackson went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of \$24,937.37.

That said loans and discounts due said bank were then and there, to wit, on December 31st, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were charged off, there still remained undivided profits for the fiscal year ending December 31, 1909, amounting to the sum of \$9,881.78.

Assignment of Error No. 9.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 12 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said J. A. Jackson was and is a man of high standing in the community, a banker of experience, capable and honest, and well acquainted with the securities of said bank and the standing of its debtors.

Assignment of Error No. 10.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 12 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

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That at the meeting of the board of directors of said Fairbanks Banking Company held on January 12, 1910, statements of the condition of the said Washington-Alaska Bank of Washington and the Fairbanks Banking Company as of date December 31, 1909, after said bad debts hereinbefore mentioned had been charged off, were presented by the officers of said banks to said board of directors; and, after the same had been discussed and examined by said directors, the same were ordered filed. That said statements showed that the undivided profits of the Washington-Alaska Bank for the year ending December 31, 1909, after deducting what the officers of said bank regarded to be all of its bad loans and discounts, was the sum of \$56,106.97. That said statement showed that the undivided profits of the Fairbanks Banking Company for the year ending

December 31st, 1909, after deducting all the bad debts, was the sum of \$9,881.78.

Assignment of Error No. 11.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 14 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That upon the 12th day of April, 1910, the directors of the Washington-Alaska Bank declared a dividend of \$50,000.

Assignment of Error No. 12.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 15 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said dividend of the Washington-Alaska Bank of Washington, to wit, \$50,000, was paid to its stockholders the Fairbanks Banking Company, \$25,000 of which said sum was ordered by the directors to be placed to the credit of the undivided profit account of said Fairbanks Banking Company, and the other \$25,000 was directed to be credited on the account for which said Fairbanks Banking Company was carrying the stock of said Washington-Alaska Bank.

Assignment of Error No. 13.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 16 of the defendants'

proposed Findings of Fact and Conclusions of Law, and which is as follows:

That after said sum of \$25,000 had been added to said undivided profit account of said Fairbanks Banking Company, the undivided profit account of said bank at said time amounted to the sum of \$34,828.55.

Assignment of Error No. 14.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 17 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the time of the declaration of said dividend, and after the adding of said sum of \$25,000 to the undivided profit account, the books of said company showed that the undivided profit account amounted to the sum of \$34,828.55, and the directors at said time honestly and in good faith believed that the undivided profits of said Fairbanks Banking Company was said sum of \$34,828.55, and said directors were so advised by the officers of said bank.

Assignment of Error No. 15.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 19 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said Fairbanks Banking Company, at the time of the declaration of the dividend was carrying the stock of the Gold Bar Lumber Com-

pany for the sum of \$341,949, and said directors in good faith believed, and, from the reports of the officers of said Gold Bar Lumber Company, as well as from the reports of people of high standing who were acquainted with said property and the value thereof, had a right to believe, that said property was worth said amount.

Assignment of Error No. 17.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 20 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the advancements made to the Tanana Electric Company by the Fairbanks Banking Company, for which two notes of the Tanana Electric Company were given to said bank amounting to the sum of \$27,997.38, were authorized and directed by the Scandinavian-American Bank of Seattle, State of Washington, and the said directors, at the time of the declaration of said dividend, believed and had a right to believe that the same was a good and valid claim against the said Scandinavian-American Bank, and a valuable asset of said Fairbanks Banking Company to the amount that the same was carried by them.

Assignment of Error No. 18.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 21 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said dividend was declared by said directors of said bank in good faith and in the honest

belief, and after the exercise of due care, that the undivided profits of said bank amounted to the sum of \$34,828.55, and that the values placed upon the assets of said bank was the true and correct one, and that the amount for which said bank was carrying its assets, and particularly its stocks, loans and discounts, were the true and correct valuation of the same.

Assignment of Error No. 19.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 22 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the dividend so paid to the stockholders, and which was received by the defendants answering in this case, was received by them without knowledge on their part that said bank did not have any surplus or undivided profits out of which said dividend could be declared or paid, or that the same was paid out of the capital of said bank; and they and each of them received the same in good faith and in the honest belief that the same was declared and paid to them out of the surplus and undivided profits of said bank.

Assignment of Error No. 20.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 26 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That in the month of March, 1911, the then receivers of the Washington-Alaska Bank, formerly Fairbanks Banking Company, intended to

bring a suit or action in the District Court for the Territory of Alaska, Fourth Judicial Division, against E. T. Barnette, who had been the president of said Fairbanks Banking Company, and a director thereof, from the time of its organization as a corporation on March 12, 1908, until it closed its doors on January 4, 1911, and as such was active and influential in the management and control of said Fairbanks Banking Company.

Assignment of Error No. 21.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 27 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the time of the suspension of said bank, said E. T. Barnette was not within the Territory of Alaska, but shortly thereafter, and in the month of February, 1911, returned to Fairbanks, Alaska, and entered into negotiations with the creditors and depositors of said Washington-Alaska Bank, and with the then receivers of said bank, for the purpose of amicably adjusting all suits and causes of action that might exist against the said E. T. Barnette on account of his liability to the creditors of said bank on account of his management thereof from the time of its organization on the 12th day of March, 1908, until the 4th day of January, 1911.

Assignment of Error No. 22.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 28 of the defendants'

proposed Findings of Fact and Conclusions of Law, and which is as follows:

That as a result of said negotiations, and in full satisfaction of all liability of the said E. T. Barnette to the creditors of said Washington-Alaska Bank for and on account of the acts and wrongs done by him, if any, during said time that he was president and director thereof, the said E. T. Barnette and Isabelle Barnette, his wife, executed an instrument in writing in which the said E. T. Barnette admitted his liability to the creditors and depositors of said bank and promised and agreed to pay all of the depositors and holders of unpaid drafts of said bank in full any deficiency that might be found to exist upon the 18th day of December, 1914, between the amounts due said depositors and holders of unpaid drafts on the 4th day of January, 1911, with interest thereon at the rate of six per cent. per annum from said 4th day of January, 1911, until the same should be paid, and the amount realized out of the property and assets of said Washington-Alaska Bank and paid to said depositors and holders of unpaid drafts.

Assignment of Error No. 23.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 29 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said Isabelle Barnette was and is the wife of said E. T. Barnette, and the said Isabelle Barnette joined in said instrument in writing because of her desire to aid her said husband in paying

the creditors and depositors of said Washington-Alaska Bank.

Assignment of Error No. 24.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 30 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said promises were made on the distinct understanding and agreement that no litigation would be instituted against the said E. T. Barnette or any other person or persons jointly liable with him for any act or deed done by him during the time that he was president and director of said bank as aforesaid; and that, for the purpose of preventing any litigation, and as security for the faithful performance of the promises made by said E. T. Barnette and Isabelle Barnette, the said E. T. Barnette and Isabelle Barnette on the 18th day of March, 1911, with the knowledge, consent and approval of this Court, conveyed to the receivers of said Bank, and the said receivers, by order of this Court, accepted a conveyance of title to an improved plantation containing 18,723 acres of land situated in the Republic of Mexico, and certain improved and income producing business property and lots situated in the incorporated town of Fairbanks, Territory of Alaska, and certain large interests in valuable association placer mining claims situated in the Fairbanks Precinct, Territory of Alaska; all of which property belonged, at the time of said conveyances, to said E. T. Barnette and Isabelle Barnette, and were and are worth the sum of \$500,000, a sum greatly in excess of all the unpaid debts and liabilities of said bank.

Assignment of Error No. 25.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 31 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That in said deed of property situated in the Republic of Mexico, as well as in the deed to property situated in Alaska, it is expressly provided that if the depositors and holders of unpaid drafts are not paid in full by the 18th day of November, 1914, either out of the property and assets of said Washington-Alaska Bank, or otherwise, or by the said E. T. Barnette and Isabelle Barnett, said receivers may sell all or any part of said land at private sale for the best possible prices obtainable; and that the moneys and funds derived from the sale of said properties shall then be paid to the depositors and owners of unpaid drafts in an amount sufficient to pay their claims and demands in full; and that, if the proceeds derived from the assets of said bank and the amounts realized from the sale of said properties shall be insufficient to pay said depositors and owners of unpaid drafts in full, then the same is to be disbursed amongst said depositors and owners of unpaid drafts pro rata; and that if the amount derived from the sale of said property shall exceed the amount sufficient to satisfy said amounts in full, with interest as above set forth, then the balance is to be returned to said E. T. Barnette and Isabelle Barnette.

And it is further provided in said deeds that if, after applying the moneys received from the property and assets of said Washington-Alaska Bank and the sale of said properties mentioned in said deeds, and any moneys obtained from George Edgar Ward and W. B. Biggs on account of an

option given to them upon the 18th day of November, 1909, to purchase an undivided 49/100 interest in and to said Mexican property for the sum of approximately \$225,000.00 there shall still remain a balance due said depositors and holders of unpaid drafts, the said E. T. Barnette and Isabelle Barnette promise and agree to pay said balance in full.

Assignment of Error No. 26.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 32 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That in said deed of the property situate in the Territory of Alaska, the receivers and their successors are authorized and empowered to take possession of the same and to receive and collect the rents, royalties and issues thereof, and disburse the same to the depositors and holders of unpaid drafts, under the orders of this Court and that, in the event the said E. T. Barnette and Isabelle Barnette and the said receivers or their successors shall deem it at any time advisable to sell any of said real estate situate in Alaska, that the same may be done by said receivers, and the proceeds derived from such sale disbursed to the depositors and holders of unpaid drafts, under the order of this Court.

Assignment of Error No. 27.

The Court erred in refusing to make the Findings of Fact set forth in paragraph 33 of defendants'

proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said receiver, plaintiff herein, holds a large amount of property belonging to said bank, which is of great value and has not been converted into money, and said property so held by him, and the property so conveyed to the receivers by said E. T. Barnette and Isabelle Barnette are more than sufficient to satisfy all the claims, demands and obligations of creditors of said Washington-Alaska Bank.

Assignment of Error No. 28.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 34 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That on the 29th day of March, 1911, the then receivers of the Washington-Alaska Bank agreed to accept in full satisfaction of the liability of said E. T. Barnette to the creditors of said Washington-Alaska Bank the said deeds of said property upon the terms and conditions thereof and the said promises of the said E. T. Barnette and Isabelle Barnette therein, and the said E. T. Barnette and Isabelle Barnette made, executed and delivered said deeds and made the said promises contained therein upon the direct understanding and agreement that the same were in full satisfaction of all suits or causes of action then existing against said E. T. Barnette on account of any and all matters and things arising from his connection or management of the affairs of the said Fairbanks Banking Company, afterwards known as Washington-Alaska Bank, and in full satisfaction of all liability of the

said E. T. Barnette to the creditors of said Washington-Alaska Bank; and that said receivers accepted and received said promises and said deeds to said property upon order of this Court in full satisfaction of all claims and causes of action of whatsoever nature that existed against the said E. T. Barnette for and on account of his management of the affairs of said bank from the 12th day of March, 1908, to the 4th day of January, 1911, and for and on account of his acts as president and as a director of said corporation.

Assignment of Error No. 29.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 35 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the receivers of said Washington-Alaska Bank, before the delivery and acceptance of said deeds hereinbefore mentioned, intended to, and if said agreement and deeds had not been made, executed and delivered to said receivers as hereinbefore stated, would have instituted an action against said E. T. Barnette to recover from said E. T. Barnette the amount of the dividend which was declared by said Fairbanks Banking Company upon the 12th day of March, 1910, and which in the complaint in this action, in paragraph 4 thereof, is alleged to have been declared wrongfully and fraudulently.

Assignment of Error No. 30.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 36 of defendants'

proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the promises of said E. T. Barnette and Isabelle Barnette and the deeds to the property hereinbefore mentioned were given by the said E. T. Barnette and Isabelle Barnette upon the express understanding and agreement that the same were in full satisfaction of any liability of the said E. T. Barnette on account of the declaration of said dividend and in discharge of any causes of action against him for and on account thereof, and the same were accepted by the said receivers of said bank upon the distinct understanding that the same were in full satisfaction of the liability of the said E. T. Barnette to the creditors of said bank on account of the declaration of said dividend, and in full discharge of the said E. T. Barnette on any causes of action that might arise therefrom.

Assignment of Error No. 31.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 37 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the receivers have received from the rents, royalties and issue of the property situate in the Territory of Alaska, the sum of \$31,400;

That the value of the property situate in the town of Fairbanks, Alaska, is the sum of \$25,000;

That the value of the mining property situate in the Fairbanks Recording District, Alaska, is the sum of \$20,000;

That the value of the Mexican property cannot be definitely determined at this time, but the same

is of great value, and was, at the time of the execution of said deed, of the value of \$500,000.

Assignment of Error No. 32.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 38 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the moneys received by the receivers from said properties and the value of the property conveyed by the said E. T. Barnette and Isabelle Barnette to the receivers as hereinbefore stated is more than ample to satisfy in full all of the liability of the said E. T. Barnette and the directors and officers of said bank to said corporation for and on account of any acts, deeds or wrongs done by them as such officers and directors, or otherwise.

Assignment of Error No. 33.

The Court erred in refusing to make and find as a conclusion of law what is set forth in paragraph 1 of Conclusions of Law in defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said dividend was declared and paid out of the undivided profits of the Fairbanks Banking Company.

Assignment of Error No. 34.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph 2 of Conclusions

of Law in defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said defendants received said dividend honestly and in good faith, believing that the same was declared and paid out of the undivided profits of said Fairbanks Banking Company, and they had no knowledge or notice that the same or any part thereof was declared and paid out of its capital stock.

Assignment of Error No. 35.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph 3 of Conclusions of Law in defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That there was a complete accord and satisfaction, as to all of the matters and things set forth in the complaint herein, had between E. T. Barnette and Isabelle Barnette and the former receivers of said Washington-Alaska Bank, and that by reason thereof all the matters and things charged in said complaint have been fully paid and satisfied.

Assignment of Error No. 36.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph 4 of Conclusions of Law in defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the defendants are entitled to a judgment and decree that the plaintiff recover nothing by this

action and that they have judgment for their costs and disbursements.

Assignment of Error No. 37.

The Court erred in overruling the defendants' objection to Finding of Fact Number 6, for the reason that the same is contrary to the evidence given upon the trial of said cause, and is not supported by any evidence.

Assignment of Error No. 39.

The Court erred in overruling the defendants' objection to that portion of Finding of Fact Number 6, wherein it is stated that the fact that said dividend was paid out of the capital stock of said bank was known to defendants McGinn, Wood and J. A. Jesson, and each of them, at said time, or should have been known to them by the exercise of reasonable diligence.

Assignment of Error No. 40.

The Court erred in overruling the defendants' objection to the Conclusion of Law Number 1 of the Conclusions of Law signed and filed in this cause, and in making the same, which is as follows:

That the defendant J. A. Jesson is liable to plaintiff by reason of the payment to him of said dividend in the sum of \$2,000.

Assignment of Error No. 42.

The Court erred in overruling the defendants objection to Conclusion of Law Number 2 of the Conclusions of Law signed and filed in this cause, and in making the same, which is as follows:

That the defendant John L. McGinn is liable to plaintiff, by reason of the payment to him of said dividend, in the sum of \$2,000.

Assignment of Error No. 43.

The Court erred in overruling the defendants' objection to Conclusion of Law Number 3 of the Conclusions of Law signed and filed in this cause, and in making the same, which is as follows:

That the defendant R. C. Wood is liable to plaintiff, by reason of the payment to him of said dividend, in the sum of \$500.

Assignment of Error No. 44.

The Court erred in entering judgment and decree in favor of the plaintiff and against the defendant John A. Jesson for the sum of \$2,000.

Assignment of Error No. 46.

The Court erred in entering judgment and decree in favor of the plaintiff and against the defendant John L. McGinn for the sum of \$2,000.

Assignment of Error No. 47.

The Court erred in entering judgment and decree in favor of the plaintiff and against the defendant R. C. Wood for the sum of \$500.

Assignment of Error No. 48.

The Court erred in refusing to make a finding that all the matters and things charged in the complaint were fully compromised and settled by the accord and satisfaction that was entered into between E. T. Barnette and Isabelle Barnette and the former receivers of said corporation.

Assignment of Error No. 52.

The Court erred in failing to make a Finding of Fact to the effect that all the wrongs charged in the complaint have been fully paid and satisfied by the said E. T. Barnette and Isabelle Barnette.

Assignment of Error No. 53.

The Court erred in failing to make a Finding of Fact to the effect that all the matters and things found against these defendants have been fully paid and satisfied by the said E. T. Barnette and Isabelle Barnette.

Assignment of Error No. 54.

The assignment of error go to the following propositions:

(1) The bank had undivided profit at the time the dividend was declared sufficient to cover the amount of the dividend.

Assignments Nos. 1, 2, 3, 11, 12, 13, 14, 15, 16, 17, 18, 34, 39, 40.

(2) The bank employed competent officials upon whom the stockholders were entitled to rely.

Assignments Nos. 4, 5, 6, 9, 10.

(3) The dividend was declared in good faith.

Assignment No. 19.

(4) The dividend was received by the stockholders in good faith.

Assignments Nos. 20, 35.

(5) The liability of the defendants was discharged by the Barnette settlement.

Assignments Nos. 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 36, 52, 53, 54.

These questions have all been fully discussed in our brief in No. 2528 to which we respectfully refer the Court.

We urge again every point made in that case and in addition thereto we beg to direct the Court's attention to the following:

It is impossible to sustain the judgment in this case under the pleadings. The judgment is predicated upon a condition of affairs entirely without the issues presented by the complaint, answer and reply.

The gist of the cause of action stated in the complaint is the payment to and receipt by the stockholders of the corporation of a dividend paid to them at the time when the corporation was insolvent.

The evidence did not show and the Court did not find that at the time of the declaration and payment of the dividend this corporation was insolvent. Unless the evidence showed and the Court found that the corporation was in fact insolvent at the time the dividend was declared and paid, the complaint was not sustained.

The theory of the Court below as shown by the findings was that the dividend was paid out of the capital stock of the corporation (p. 37), and was in violation of the law of the State of Nevada under which the corporation was organized (pp. 37-8).

If the plaintiff was entitled to recover on the *facts found*, his complaint is insufficient to support the judgment for the reason that there is no allegation in the complaint that the defendants received the dividend with the knowledge that the capital of the bank

was thereby impaired or with the knowledge that the dividend was paid in violation of the law of the State of Nevada. There is no averment in the complaint as to what constitutes the law of the State of Nevada on this subject, and there was no finding of the Court upon that subject either. The meager reference to the Nevada law in the findings is confined to the following:

“That said dividend was declared and paid in violation of the laws of the State of Nevada under which said corporation was organized” (p. 37).

If the plaintiff did not succeed in establishing the actual insolvency of the bank at the time the dividend was declared, he could not recover upon the complaint as framed.

The complaint does not state the necessary facts to sustain the judgment on any other theory. It did not appear from the complaint (1) that any of the defendants had any knowledge that the capital of the bank was impaired or (2) that any of them were directors of the bank or (3) that the Board of Directors in declaring a dividend knew that the bank had no profits out of which the dividend might be declared, or (4) that any of the defendants knew that the dividend was any other than a perfectly regular and lawful dividend.

In the case of *McDonald v. Williams*, 174 U. S., 397, the receiver of a National Bank had brought an

action for the purpose of recovering from the defendants who were stockholders in the bank the amount of certain dividends received by them before the appointment of the receiver. The bank suspended in January, 1893, in a condition of hopeless insolvency. The suit was brought to compel re-payment of certain dividends paid by the bank to the defendants on the ground that the dividends were fraudulently declared and paid out of the capital of the bank and not out of net profits. The defendants were ignorant of the financial condition of the bank and received the dividends in good faith, relying upon the officers of the bank and believing the dividends were coming out of the profits.

The Court said:

“The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back.

* * * * *

“But it is urged on the part of the complainant that section 5204 of the Revised Statutes makes the payment of a dividend out of capital illegal and *ultra vires* of the corporation, and that money thus paid remains the property of the corporation, and can be followed into the hands of any volunteer.

“The section provides that ‘no association, or any member thereof, shall, during the time it shall con-

tinue its banking operations, withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital.' What is meant by this language? Has a shareholder withdrawn or permitted to be withdrawn in the form of a dividend any portion of the capital of the bank when he has simply and in good faith received a dividend declared by a board of directors of which he was not a member, and which dividend he honestly supposed was declared only out of profits? Does he in such case within the meaning of the statute withdraw or permit to be withdrawn a portion of the capital? The law prohibits the making of a dividend by a national bank from its capital or to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. The fact of the declaration of a dividend is in effect the assertion by the board of directors that the dividend is made out of profits. Believing that the dividend is thus made, the shareholder in good faith receives his portion of it. Can it be said that in thus doing he withdraws or permits to be withdrawn any portion of the capital of the corporation? We think he does not withdraw it by the mere reception of his proportionate part of the dividend. The withdrawal was initiated by the declaration of the dividend by the board of directors, and was consummated on their part when they permitted payment to be made in accordance with the declaration. We think this language implies some positive or affirmative act on the part of the shareholder by which he knowingly withdraws the capital or some portion thereof, or with knowledge permits some act which results in the withdrawal, and which might not have been so withdrawn without his action. The permitting to be withdrawn cannot be founded upon the simple receipt of a dividend under the facts stated above.

One is not usually said to permit an act which he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge. Ought it to be said that he withdraws or permits the withdrawal by ignorantly, yet in entire good faith, receiving his proportionate part of the dividend? Is each shareholder an absolute insurer that dividends are paid out of profits? Must he employ experts to examine the books of the bank previous to receiving each dividend? Few shareholders could make such examination themselves. The shareholder takes the fact that a dividend has been declared as an assurance that it was declared out of profits and not out of capital because he knows that the statute prohibits any declaration of a dividend out of capital. Knowing that a dividend from capital would be illegal, he would receive the dividend as an assurance that the bank was in a prosperous condition and with unimpaired capital. Under such circumstances we cannot think that Congress intended by the use of the expression 'withdraw or permit to be withdrawn, either in the form of dividends, or otherwise,' any portion of its capital, to include the case of the passive receipt of a dividend by a shareholder in the *bona fide* belief that the dividend was paid out of profits, while the bank was in fact solvent. We think it would be an improper construction of the language of the statute to hold that it covers such a case."

In the case of *Jesson v. Noyes* now before the Court, No. 2528, the appellants McGinn and Jesson are held liable and judgment is rendered against them as directors for declaring the identical dividend involved here. The curious result is that the directors are ordered to pay to the receiver in one action the

amount of a dividend paid to themselves as stockholders, and in the other action brought against them as stockholders, they are again ordered to pay the same amount to the receiver.

It is respectfully submitted that the judgment should be reversed.

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Of Counsel.

In the
United States Circuit Court of Appeals ₃
For the Ninth Circuit.

R. C. WOOD, JOHN L. McGINN and JOHN A. JES-
SON, - - - - - *Appellants,*

VERSUS

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation, - - *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

B R I E F O F A P P E L L E E .

O. L. RIDER,
Attorney for Appellee.

Filed

MAY 23 1911

F. D. Monckton,

In the

UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth Circuit.

No. 2529

R. C. WOOD, JOHN L. McGINN and JOHN A. JES-
SON, - - - - - *Appellants,*

vs.

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation, - - *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

BRIEF *of* APPELLEE.

This was an action brought by the receiver of an insolvent bank to recover from stockholders a dividend which had been paid to and received by them out of the capital of the bank and not out of the surplus or undivided profits. Judgment was rendered in fa-

vor of all of the defendants who were not officers or directors of the bank. The three defendants involved in this appeal, Messrs. Wood, McGinn and Jesson, was each a director at the time the dividend was declared. As to them the court found that they knew that the dividend was not declared out of any surplus or undivided profits, or that by exercise of reasonable diligence they could so have known. This finding is squarely made by the court on conflicting testimony, and by it the defendants are bound on appeal.

The case of *McDonald v. Williams*, 174 U. S. 397, cited by counsel in their brief, has no application to such finding. It was a case where recovery against the stockholders receiving a dividend declared during insolvency was not allowed, because the proof failed to show that such stockholders had knowledge of the insolvency of the bank at the time the dividend was declared.

The only other point urged by counsel as a basis for reversal is that the facts stated in the complaint are insufficient to support the judgment, for the reason that there is no allegation in the complaint that the defendants received the dividend with knowledge that the capital of the bank had been impaired or that it was paid in violation of the laws of Nevada. No objection was made to the complaint in the lower court. No demurrer was filed questioning the sufficiency of the facts stated. If the omission to charge such knowledge in the complaint is a defect, and it is not conceded that it is, the same has been waived by

these defendants. In their answer the defendants allege that at the time they received the dividend they believed the bank to be solvent and that they received the dividend in good faith, believing that it came out of the profits of said bank and not otherwise. Reply was filed, denying this allegation of the answer. These pleadings, subsequent to the complaint, put in issue the good faith of the defendants in receiving the dividends and their claim of want of knowledge that the dividend was not paid out of the profits of the bank. Such subsequent pleadings cure the alleged defect in the complaint.

—*Catlin v. Jones*, (Or.) 85 Pac. 515.

The defendant, Wood, claimed that he was not liable for the return of the dividend because the stock on which the same was declared and paid to him did not belong to Wood but to another party. The proof showed, however, that even though this stock did not belong to Wood, he turned the dividend over to said other party and never returned it to the bank, and that he did so, knowing that the dividend was not paid out of any surplus or undivided profits. Under the decision in *Finn v. Brown*, 142 U. S. 56, 35 L. ed. 936, Wood is liable to the receiver for this dividend, even under the above alleged state of facts. In that case it was held,

“Where a person receives from a bank a dividend on stock which he denies owning, he should restore the dividend to the bank; he does not free himself from liability for it by giving his check

on the bank for the sum to the alleged true owner.”

The matter of the insolvency of the bank at the time the dividend was declared has been fully considered in the brief of appellee filed in this court in the companion case of *Jesson v. Noyes*, No. 2528, being an action against the directors for unlawfully declaring and paying this particular dividend. To that brief, reference is respectfully made on all of the other questions involved in this appeal.

Speaking of the case of *Jesson v. Noyes*, *supra*, insofar as it involves the declaration and payment of the dividend, counsel say in their brief, page 32, as follows:

“ The curious result is that the directors are ordered to pay to the receiver in one action the amount of a dividend paid to themselves as stockholders, and in the other action brought against them as stockholders, they are again ordered to pay the same amount to the receiver.”

In said *Jesson v. Noyes*, judgment for the entire dividend was rendered against appellants, jointly and severally, in the sum of \$33,720.00, for their misconduct as directors of the bank in declaring and paying the same when there was neither surplus nor undivided profits. This was a joint and several judgment on the tort. In this action they are being proceeded against as stockholders to recover that portion of the dividend which was paid to and received by

them. As such stockholder, each is liable for the return of what he received. No doubt, upon such return, these appellants would be entitled to a credit on their joint and several liability, above referred to, or upon satisfaction of the judgment recovered against them as directors, these individual judgments as stockholders would be extinguished.

It is respectfully submitted that in this action the judgment of the lower court should be affirmed.

O. L. RIDER,
Attorney for Appellee.

No. 2529.

In the
UNITED STATES CIRCUIT COURT of APPEALS
for the Ninth Circuit.

R. C. WOOD, *et al.*, - - - - - *Appellants,*

VERSUS

F. G. NOYES, Receiver, etc., - - - - - *Appellee.*

Brief of Appellee on
Petition for Rehearing.

ORION L. RIDER,
Vinita, Oklahoma,
Attorney for Appellee.

FILED
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In the
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 2529

R. C. WOOD, *et al.*, - - - - - *Appellants,*

vs.

F. G. NOYES, Receiver, etc., - - - - - *Appellee.*

BRIEF OF APPELLEE ON
PETITION FOR REHEARING.

Petitioners ask for a rehearing herein upon the following matters:

First. The effect of the Barnette trust deeds.

Second. That the lower court had no jurisdiction of the subject matter.

Third. That the complaint did not state a cause of action.

I.

The Barnette Trust Deeds.

This subject has been gone over so many times in the course of this litigation that it must have become wearisome to the court. Nothing of merit that is new has been presented. Some further fault is found as to the reasoning by which this court arrived at its final conclusion, but that conclusion has not been shaken by anything that has been said. This court has clearly and decisively stated the gist of the whole matter in the following language:

“* * * there is nothing in the evidence to show that the deeds were accepted in accord and satisfaction of the claims of the corporation against Barnette or any of the appellants.” (*Jesson v. Noyes*, 245 Fed. 46, 53.)

The fact that the Receiver may have entered into the possession of the property described in one of the deeds could not change the proposition that there had been no accord and satisfaction. This court has correctly in mind the nature and effect of that possession and gave it full consideration in the opinion in the case last referred to. What is there said is an answer to the present contentions of the petitioners herein in this language:

“Again, the property was not all surrendered *absolutely* for the payment of the depositors and holders of unpaid drafts, but a portion thereof was surrendered only for the *payment of a deficit to be thereafter ascertained* as between the

— 3 —

amounts due depositors and owners of unpaid drafts and the amount realized by the receivers out of the property and assets of the bank. None of the proceeds of the property so surrendered by Barnette in the first deed can be applied to payment of depositors and holders of unpaid drafts until the property and assets of the bank shall have been realized on and devoted to liquidation. *There was imposed upon the receivers, by their acceptance of the conveyances, the obligation to pursue all available remedies to recover the assets, including, we think, the assets which may be recovered in the present suit.*"

II.

The Questions of Jurisdiction and Sufficiency of Facts.

It is now urged, for the first time in this case that the lower court was without jurisdiction of the subject matter of the action, and that the complaint does not state a cause of action in the Receiver. By the *first*, petitioners seek to question the authority of the lower court, exercised in the case of *Tanana Valley Railroad Company and John Zug v. Washington-Alaska Bank*, to appoint a Receiver in that action; and, by the *second*, they would question the capacity of appellee as such Receiver to maintain the action at bar.

Neither of these propositions has ever been presented or even hinted at before. It never before was intimated, either in the lower court or in this court, that the lower court was not acting within its jurisdiction and authority when it appointed appellee as

receiver in the *Tanana Valley Railroad Company* case. Petitioners seem to think they can resort to a different and independent form of attack each time they appear in any matter pertaining to any of these cases, always holding something up their sleeves for the future, instead of regarding an appellate court as a place to correct errors suggested to the lower tribunal, and to finally dispose of matters on a full hearing and not by piecemeal.

By the fourth subdivision of the very Statute of Alaska quoted at page 9 of their brief, the District Court did have authority and jurisdiction to appoint a Receiver "when a corporation is insolvent or is in imminent danger of insolvency." It is alleged in the complaint (Rec., pp. 8, 9, 10) that after April 12, 1910, this bank "was at all times insolvent and in a failing condition"; that the Receivers were appointed on January 5, 1911; and that on the date that the bank ceased business on January 4, 1911, the assets of the bank were then and still are insufficient to pay its liabilities in full. The insolvent corporation was doing business at Fairbanks, Alaska, and within the jurisdiction of the court making the appointment of the Receivers. Its property was also within said jurisdiction. Said court did then have jurisdiction of the subject matter. Such facts existing the appointment can not be collaterally attacked. *Shinney v. North Amercian etc. Co.*, 97 Fed. 9; *Gunby v. Armstrong*, 133 Fed. 417. So far as appears from the record in this case, the appoint-

ment of the Receivers in the *Tanana Valley Railroad Company* case, or of the substitution of the appellee herein in their stead, has never been questioned in any way by said bank or even objected to for any reason. Nor is there any contention here by these petitioners that the bank ever did make any protest about the matter. These petitioners were not parties to that suit, and can not question collaterally what was done therein. After his appointment, the Receiver was subject to the order of the court appointing him. If he acted without proper order (and it is not, and never was, contended that he did), such fact would effect only his powers and capacity to act, and not the jurisdiction of that court to appoint him.

The cases cited by petitioners on this proposition are not in point. The sole point involved in such cases was the right of an ancillary receiver, appointed in one jurisdiction, to maintain an action in a foreign jurisdiction. That is not the situation in the case at bar. Here the Receiver is suing within the jurisdiction of the court which appointed him.

Aside from the statutory authority for the appointment, above referred to, a court of equity has general power to appoint a receiver for the assets of a foreign corporation within its jurisdiction. *Shinney v. North American etc. Co., supra.*

The second proposition presented by petitioners under this heading questions the right of the Receiver, appellee herein, to maintain this action. In

other words, they would question his capacity to sue. This matter was never presented to the lower court. Want of legal capacity to sue is made a ground of demurrer by the Alaska Code of Civil Procedure (Sec. 890) ; but no such ground was ever presented by petitioners. It is further provided by said Code as follows:

“*Sec. 894.* If no objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action.”

In *Walsh v. Brynes*, (Minn.) 40 N. W. 831, it was held that the claim that the complaint is insufficient because the facts establishing the jurisdiction of the court to appoint the plaintiff as receiver are not more fully stated and that his authority to bring the action does not appear, could not be raised under a general demurrer, the proper ground being that the plaintiff has not legal capacity to sue.

In *Allen v. Baxter*, (Wash.) 85 Pac. 26, it was held that objections to the sufficiency of the complaint which alleged that the plaintiff was appointed and qualified as receiver, and which failed to show in what case or court he was appointed receiver, could not be raised by general demurrer, although they might have been raised by proper motion.

It is respectfully submitted that the Petition for Rehearing herein should be denied.

ORION L. RIDER,
Attorney for Appellee.

No. 2529.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

R. C. WOOD, et al.,

Appellants,

vs.

F. G. NOYES, Receiver, etc.,

Appellee.

PETITION FOR REHEARING

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Attorneys for Petitioners.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

R. C. WOOD, JOHN L. McGINN and
J. A. JESSON,

Appellants,

vs.

F. G. NOYES, as Receiver of the Wash-
ington-Alaska Bank, a corporation or-
ganized under the laws of the State of
Nevada,

Appellee.

No. 2529.

PETITION FOR REHEARING.

We ask for a rehearing in this case for the fol-
lowing reasons:

1. That it is plainly apparent from the opinion
filed herein,

(a) That the Court has misconceived what
issues were covered by the findings and

(b) That the Court has overlooked the admis-
sions made by the appellee in its reply.

2. That the Court below has no jurisdiction of the
subject matter.

3. That the complaint did not state a cause of action.

I.

The Court in its opinion says:

“the findings covered the material issues made by the pleadings and upon the record we cannot hold that the evidence was insufficient to justify the findings made or that the Court below erred in refusing to make the numerous findings requested by the appellants.”

We submit that in this statement the Court is in error. There was no finding by the lower Court on the issues raised by the answer and reply as to the defenses of accord and satisfaction and full or partial satisfaction of the wrong complained of.

This Court in its opinion likewise failed to pass upon these issues, the Court in this respect saying:

“the other defenses referred to were on appeal (Cause 2528) from the judgment there given by the trial Court held by this Court at the last term to be of no avail so that no further reference to those defenses need now be made.”

It is true that in Cause No. 2528 this Court passed upon the defense of accord and satisfaction as presented by the appellants, but it failed to pass upon the other defense urged by them that if said agreement between Barnette and the receiver did not constitute an accord and satisfaction, nevertheless it did

constitute a covenant not to sue, and that any thing received by the receiver in consideration of his covenant not to sue Barnette either permanently or for a limited time, should be applied in reduction of the liability of his joint *tort feasers*.

Furthermore, the Court in said Cause 2528 *did not pass upon the question* that is presented by the facts admitted by the pleadings in *this* case.

The defense of the appellants in Cause 2528 that the agreements between Barnette and the receiver constituted an accord and satisfaction and thereby operated as a release of Barnette, was held by this Court to be of no avail in that case upon the assumption that the facts therein showed that

“he (Barnette) stipulated in his deed that the receivers were not to take possession of the property conveyed nor the rents, issues or profits thereof, nor had any right to the possession or use thereof at any time prior to November 18, 1914. The receivers considered that their acceptance of the conveyance obligated them not to sue Barnette before November 18, 1914, and the appellee so pleaded its effect in the reply.”

We contended in our petition for a re-hearing in Cause 2528 that this Court was in error as to what the record disclosed in this respect; that this Court had inadvertently fallen into an error in assuming that the trust deeds were identical in their provisions; that as to the property transferred by the Mexican deed this Court's position as to the right of the re-

ceiver to possession was correct; but that as to the Alaska property it was expressly provided in that deed that the receiver might take immediate possession of the same and collect the rents, issues and profits thereof and apply the same under order of the Court, in payment of the claim of creditors.

In the case at bar, however, this Court, we suggest, is foreclosed from arriving at the conclusion stated in the opinion in Cause 2528 because it is contrary to the admissions of the pleadings herein.

The allegations of the complaint herein charged that Barnette was a joint tortfeasor with the appellants (Tr., 1-14).

The answer alleges that the receiver intended to bring action against Barnette to fix his liability to the creditors of the Washington-Alaska Bank; that to prevent this action he conveyed to the receivers (which the receivers accepted under order of the Court) title to certain property situated in the Republic of Mexico, and also property situated in the District of Alaska; that as to the Alaska property the receivers were entitled to and did take immediate possession and receive and collect the rents, issues and royalties derived therefrom, and were entitled to distribute the same to the creditors of said Washington-Alaska Bank under order of Court (Tr., 21-28).

The plaintiff in reply to these allegations of the answer (Tr., 32-3) says:

“Sixth. He admits the conveyance to the former

receivers herein of *title* to the property referred to in said answer and that he *has taken possession* thereunder of the property therein described and located in the Territory of Alaska.

"Seventh. He admits that he has received the rents, royalties and issues of said property situated in the Territory of Alaska, and he alleges that the net amount thereof so received by him up to June 1st, 1914, is approximately \$31,478.65 less such reasonable charge as may be allowed for the collection thereof, as provided in said conveyance."

These admissions of the plaintiff are in direct opposition to the finding of this Court, stated in its opinion in Cause 2528 that

"he (Barnette), stipulated in his deed that the receivers were not to take possession of the property conveyed, nor the rents, issues or profits thereof, nor had any right to the possession or use thereof at any time prior to November 18, 1914."

These admissions in the pleadings in the case at bar therefore present a legal issue that was not passed upon by this Court in its opinion in Cause 2528.

The Court also based its opinion in Cause 2528 upon the statement,

"that the receivers considered that their acceptance of the conveyance obligated them not to sue Barnette before November 18, 1914, and the appellee so pleaded its effect in the reply."

No such allegation is found in the reply of the plaintiff in this case.

This admission of the plaintiff that he received *title*

and *possession* of the Alaska property and that by virtue of said title and possession *he has received approximately the sum of \$31,478.65*, makes this sum so received by him absolutely the money of the receivership. It was on account of the joint wrong doings, if any, of Barnette and these appellants that the receiver obtained this property and money.

Is it conceivable that money so received from one joint tortfeasor is not to be applied in full or partial reduction of the liability of the other joint tortfeasors? To so hold is to maintain that there can be many duplicate recoveries from joint tortfeasors for the same wrong; contrary to the doctrine of all of the authorities on this subject and the decisions of this court.

“In cases of joint torts, the injured person may sue one, or any number less than all of the joint *tortfeasors*, or may sue all; and, where there is but one injury, there can be but one satisfaction.”

Tanana Trading Co. v. North American T. & T. Co., 220 Fed. Rep. 786 (Ninth Circuit, C. C. A.).

II.

The District Court of Alaska had no jurisdiction to appoint a receiver in the case of *Tanana Valley Railroad and John Zug v. Washington-Alaska Bank*, and thereby authorize him to institute this action.

The appellants contend that the plaintiff had no right to maintain this action upon the grounds,

that not only does the complaint fail to show any cause of action in him but also that the Court was and is without jurisdiction of the subject matter of this action and that all of its acts in this proceeding are null and void.

Objection was made in the lower Court by demurrer that the complaint did not state facts sufficient to constitute a cause of action which demurrer was overruled but irrespective of this "the objection to the jurisdiction of the Court and the objection that the complaint does not state facts sufficient to constitute a cause of action," even if no objection thereto be taken by demurrer or answer in the lower Court is not waived (Carter Code, Alaska, p. 157), and may be raised at any stage of the proceedings.

The right of the plaintiff to maintain this action depends entirely upon his right and status as receiver of the Washington-Alaska Bank, and this right and status is not alone dependent upon the order of the Court appointing him but also upon the power of the Court to make that order.

The complaint discloses that the Washington-Alaska Bank is a corporation organized and existing under the laws of the State of Nevada (Tr., 3), and was engaged in banking in the town of Fairbanks, Alaska, and alleges (Tr., 9) that:

"on January 5th, 1911, in a certain suit entitled '*Tanana Valley Railroad Company, a corporation, and John Zug, plaintiff, v. Washington-Alaska*

Bank, a corporation, defendant, commenced in said District Court, Territory of Alaska, Fourth Division, an order was duly given and made appointing F. W. Hawkins receiver of said Washington-Alaska Bank, who thereupon duly qualified and entered upon his duties as such receiver. Thereafter, on the 6th day of January, 1911, said District Court by an order duly given and made appointed E. H. Mack jointly with said Hawkins, receiver of said Washington-Alaska Bank, and said Mack thereupon duly qualified and entered upon his duties as such receiver; and thereafter said Hawkins and Mack continued to be and act as receivers of said Washington-Alaska Bank until the 12th day of May, 1911, when said Hawkins and Mack resigned as such receivers, and thereupon on said date last named said District Court, by an order duly given and made and entered appointed the plaintiff F. G. Noyes, receiver of said Washington-Alaska Bank, and said F. G. Noyes thereupon duly qualified as such receiver and ever since has been, and now is the duly qualified and acting receiver of the said Washington-Alaska Bank, and as such is plaintiff in this suit."

The appointment and qualification of the plaintiff herein as receiver was denied in the answer of appellants (Tr., p. 17), and no finding was made by the Court on that subject.

The nature of the suit of *Tanana Valley Railroad Company and John Zug v. Washington-Alaska Bank*, whether at law or in equity does not appear, nor is it shown what was the character of the relief sought to be obtained, nor the rights or functions of the receiver.

In any event the appointment was made either by virtue of the chancery powers of the Court or by virtue of the Alaska statute.

The entire statutory law of Alaska in regard to receivers is found in Chapter 77, part IV, page 300, of Carter's Annotated Code of Alaska.

Section 753 thereof provides:

"A receiver may be appointed in any civil action or proceeding other than an action for the recovery of specific personal property . . .

"Fourth. *In cases provided in this Code* or by other statute when a corporation has been dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights."

The cases provided in this code are:

"First. Provisionally, before judgment, on the application of either party, when his right to the property which is the subject of the action, or proceeding, and which is in the possession of an adverse party, is probable, and the property or its rents or profits are in danger of being lost or materially injured or impaired;

"Second. After judgment, to carry the same into effect;

"Third. To dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the debtor refuses to apply his property in satisfaction of the judgment or decree; . . .

"Fifth. In the cases when a debtor has been declared insolvent."

These are the only cases where by the Code or by statute a receiver may be appointed in Alaska. It is clear, therefore, that under these statutory provisions the Court was without jurisdiction to appoint and confer upon a receiver authority to institute a suit against the stockholders of the Washington-Alaska Bank to recover a part of the capital of said Bank alleged to have been wrongfully paid them.

We must therefore look to the chancery powers of the Alaska Court.

It is a grave question whether under any circumstances a Court of equity has the power under its general chancery jurisdiction to appoint a receiver of a corporation to wind up its affairs. There is abundant authority to the effect that that cannot be done even in the case of domestic corporations.

But it is not necessary to go into that question here, because in any event regardless of its powers over domestic corporations, there can be no question that a Court of equity cannot appoint a receiver for a foreign corporation or over its assets where the effect would be tantamount to a winding up of the corporation.

THE ALASKA COURT HAD NO JURISDICTION TO APPOINT
A RECEIVER FOR A CORPORATION ORGANIZED UNDER
THE LAWS OF ANOTHER STATE.

It is our contention that the Court of Alaska under its general chancery powers had no jurisdiction to appoint a receiver to liquidate or wind up the affairs of the foreign corporation and that the utmost of its powers was to appoint a receiver ancillary to an actual pending suit whose authority is limited to receive and preserve the property *pendente lite*.

There is an essential difference between an ordinary receiver in chancery and a statutory receiver appointed to wind up the affairs of an insolvent or dissolved corporation. The distinctive feature of an ordinary chancery receiver is that he is a mere custodian.

"A chancery receiver is an indifferent person appointed by the Court to hold property in litigation pending suit. He is a ministerial officer with the functions of a custodian. He derives his authority from the Court and not from the parties at whose instance he is appointed. He acts in behalf of no particular interest and guards the rights of all. Being a mere holder his appointment does not change the title of the property nor alter any lien or contract."

Penn. Steel Co. v. N. Y. C. R., 198 Fed. 728;

Booth v. Clarke, 17 How. 322;

Quincy etc. v. Humphreys, 145 U. S. 82;

Union Bank v. Kansas Bank, 136 U. S. 223;

Gaither v. Stockbridge, 67 Md. 222;

Atlantic Trust Co. v. Chapman, 208 U. S. 360;
Fowler v. Osgood, 141 Fed. 20;
Covell v. Fowler, 144 Fed. 335;
Edwards v. N. A. T. W. Co., 139 Fed. 795;
Maguire v. Mortgage Co. of America, 203
 Fed. 858;
Decker v. Gardner, (N. Y.), 11 L. R. A. 480;
 5 Thomp. Cor., Sec. 6396.

As said by the Supreme Court of the United States, in *Railroad Co. v. Humphreys*, 145 U. S., 82, 12 Sup. Ct., 787, speaking of the Wabash receivers:

"They were ministerial officers, appointed by the Court of chancery to take possession of and preserve, *pendente lite*, the fund or property in litigation; mere custodians coming within the rules stated in *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223, 236, 10 Sup. Ct. 1013, where this Court said: 'A receiver derives his authority from the act of the Court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the Court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession in the property.'"

"A mere Court receiver unlike a statutory receiver is not vested with the title to property, but it remains in those for whose benefit he held it. He is clothed with no estate in the property, but is mere custodian of it for the Court, nor in a

legal sense is the property in his possession. It is in the possession of the Court by him as its officer."

10 *Enc. of U. S. Sup. Ct. Rep.*, 546.

"A chancery receiver is a receiver *pendente lite* and does not take title and hence differs from a statutory receiver, who is practically an assignee."

Cook on Corp. (7 ed., sec. 866, p. 3322.)

In the case of *Farmers' Loan and Trust Co. v. O. R. R. Co.*, 48 Pac. 706, the Supreme Court of Oregon—the laws of which State were extended by Congress to Alaska and were in force when the said receiver was appointed—says:

" . . . A receiver represents no particular interest or class of interests. He holds for the benefit of all who may ultimately show an interest in the property. He stands no more for the creditor than the owner. They are not assignees. . . ."

In the case of *Hilliker v. Hale*, 117 Fed. 220, the Court of Appeals for the Second Circuit, said:

"We are further of the opinion that the plaintiff cannot maintain this action. He sues as receiver. His rights, if any, rest wholly upon the order and decree in the Rogers case. Without regard to the nature of the claim asserted against the defendant, the plaintiff has no relation to that claim otherwise than through such order and decree. He is not the assignee of all or any of the creditors. He has no title to anything so far as appears, except to his office as receiver. The order and decree, in terms, makes him a mere agent of

the Minnesota Court. That Court undertook to authorize him to sue nonresidents in other jurisdictions; moneys collected to be 'held by him subject to the further order of this Court (the Minnesota Court) in the premises.' The Minnesota Court thus attempted to send its agent to collect money by suit outside of its jurisdiction, and to bring it back to be disposed of as it might direct. If it had had power to transfer the claim against the defendant to the plaintiff, and had in fact so transferred it, he could assert the title thus acquired, and sue upon such claim here, in accordance with the principles stated in *Association v. Rundle*, 103 U. S. 222, 26 L. Ed. 337. Apparently the Court had no such power. Whether it had or not, it did not attempt to exercise it. It transferred nothing to the plaintiff. It merely appointed him its own agent to collect and hold subject to its order."

The rule sustained by the authorities is that the courts of one State have no jurisdiction to appoint a receiver for a corporation organized under the laws of another State, but that a receiver may be appointed for the assets of the foreign corporation which are within the particular State where the action is brought, and these may be subjected to the claims of creditors.

Pacific Coast Coa. Co. v. Esary (Wash.), 148 Pac. 579;

3 *Clark & Marshall, Private Corp.*, p. 2756;

5 *Thompson Corp.* (2nd Ed.), Sec. 6332;

Stafford & Co. v. American Mills Co., 13 R. I. 310;

Leary v. Columbia River etc. Co., 82 Fed. 775;

Sidway v. Missouri, etc., Co., 101 Fed. 481;
Hutchinson v. American Palace Car Co., 104
 Fed. 182;
 5 *Thomp.*, Sec. 6332.

THE DISTRICT COURT OF ALASKA COULD HAVE NO POWER
 TO DISSOLVE OR WIND UP THE AFFAIRS OF A FOREIGN
 CORPORATION.

A Court of equity has no jurisdiction whatever to
 dissolve or wind up a foreign corporation.

3 *Clark & Marshall*, Priv. Cor., p. 275.

The general rule is that the general jurisdiction of
 equity over corporations does not extend to the powers
 of dissolution of the corporation or the winding up of
 its affairs.

“It is hardly necessary to remark that if Courts
 of equity, at the suit of a shareholder, and in the
 absence of a statute, have no jurisdiction to dissolve
 a domestic corporation, and to wind up its affairs,
 much less can they exercise such powers with re-
 spect to a foreign corporation. It has, indeed,
 been held on much consideration that the Courts
 of a State have no visitatorial powers over foreign
 corporations doing business within the State, unless
 such power is expressly conferred by local statutes;
 and for that reason it was ruled by the Supreme
 Court of Maryland that it would not entertain a
 proceeding by a citizen of Maryland, who was a
 shareholder in a foreign company, to compel it to
 annul an alleged wrongful forfeiture of his stock,
 and to reinstate him as a stockholder. *Mining Co.*

v. *Field*, 64 Md. 151; 20 Atl. 1039. See, also, *Wilkins v. Thorne*, 60 Md. 253."

Republican Mountain Silver Mines v. Brown,
58 Fed. Rep. 644-8;

Georgia v. Locke, 50th Ala. 332.

In *Conklins v. U. S. Shipbuilding Co.*, 140 Fed. 220, the Court said:

"It is well settled that a Court of equity independent of statutory authority cannot decree the dissolution of a corporation."

N. J. L. R. Co. v. Commissioners, 39 N. J. Law, 28;

Morawetz Priv. Cor., sec. 1040;

Thomp. on Cor., secs. 4538, 6598 and 6854.

The general powers of a Court of equity do not therefore extend to the appointment of a receiver of the corporation, except in the State from which the corporation derives its corporate existence.

A general receiver of a corporation is for all purposes the corporation itself, and there devolves upon him by operation of law the rights of action which are the property of the corporation, but such a receiver of a Nevada corporation the Alaska Court was without jurisdiction to appoint. It might have appointed a receiver in an ancillary proceeding who would represent a general receiver had there been such a one, and who as his representative could main-

tain and enforce rights of action in his favor, but no such state of affairs appears here.

The Court being without jurisdiction to appoint the receiver originally and authorize him to institute this action, the entire proceeding is void.

In *Murray v. American Surety Company*, 70 Fed. 339, this Court held that a receiver of a bank appointed by the Superior Court of California in a proceeding where such appointment could not properly be made had no right to maintain a suit on bonds given by officers of the bank to indemnify it against pecuniary loss caused by the dishonesty of its president or cashier, and that the entire proceeding was void and subject to collateral attack.

III.

THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO
CONSTITUTE A CAUSE OF ACTION.

The gist of the plaintiff's complaint is that the defendants were stockholders of a Nevada corporation and received money from it by way of a dividend which the Board of Directors had improperly declared; that these defendants received this dividend with knowledge on their part that it was unlawfully declared.

Assuming for the sake of argument that these facts pleaded state a cause of action in favor of someone, there is nothing in the complaint to show that that cause of action is in favor of the plaintiff. In order

for him to state a cause of action he must show the right of action in himself. Inasmuch as the cause of action originally accrued to someone else, namely, the corporation or its creditors, it was incumbent upon the plaintiff as a part of his case to show that that right of action had devolved upon him, either by operation of law or by assignment, or by some other mode.

“It is incumbent upon the plaintiff to allege sufficient facts to show that he is concerned with the cause of action averred, and is the party who has suffered injury by reason of the act of the defendant. In other words, it is not enough that he alleges a cause of action existing in favor of some one; he must show that it exists in favor of himself.”

31 Cyc. 102, and cases cited.

“The burden should not be placed upon defendant to show that plaintiff is not the aggrieved party and that he has sustained no damages.”

31 Cyc. 103;

Rayner v. Clark, 7 Barb. (N. Y.), 581.

“It is also necessary to allege facts showing that the cause of action alleged accrued to him in the capacity in which he sues and for this purpose it is necessary to allege his authority.”

31 Cyc. 103, and cases cited.

Holliday v. Davis, 5 Or. 40;

Smith on Receivers, sec. 71;

Simmons v. Taylor, 106 Tenn. 729;

High on Receivers, sec. 201.

There is nothing in the complaint whatever to show any right upon the part of the plaintiff. There is nothing but a naked allegation that an action was commenced, entitled "*Tanana Railway Co. v. Washington-Alaska Bank*," and that in that action the plaintiff was appointed a receiver of the Bank. There is nothing to show the character of the action or the purpose of the receivership, or the functions or powers of the receiver; nothing, in fact, to show in what manner a receiver appointed in that action could become entitled to maintain this or any other action. Presumably the action of the *Tanana Railway Co. v. Washington-Alaska Bank* was an action of which the Alaska Court had jurisdiction. If that were the case the only receiver which it could appoint would be one to take the custody of assets of the bank and hold them *pendente lite* subject to the order of the Court. If he were entitled to bring an action in his own name upon claims due the Bank, something must be shown which vested the title to such choses in action in the receiver. There is absolutely nothing in the complaint to show such right, and without allegations covering it the complaint does not state a cause of action.

The fact that one alleges that he is the "receiver" of a corporation conveys no information as to his power or authority. This was a foreign corporation.

The control which the Alaska Court could exercise over its affairs was limited in the extreme.

It could not interfere in the internal affairs of the corporation.

Richardson v. Clinton Wall Trunk Mfg. Co.,

181 Mass., 580, 64 N. E., 400;

Beale on Foreign Corporations, secs. 300 et seq.

It could only exercise such powers as were directly related to the objects of the action which was pending before it, in which the order was made which appointed the plaintiff "receiver."

What was the action?

It may have been a creditor's bill seeking to subject the property of the bank to some judgment. Perhaps it was a stockholders' suit seeking to have the corporation wound up. Perhaps the plaintiffs claimed to be partners with the defendant in the bank and sought a dissolution, or maybe the case was simply a foreclosure suit in which the plaintiff asked for a receiver of the mortgaged property.

In each of these cases the objects, duties and powers of a receiver would be different, and it was incumbent upon the plaintiff to show the character of his receivership, and unless his complaint showed that he was appointed receiver in some proceeding whose objects and purposes had some conceivable connection with the purpose of the case at bar he failed to state a cause of action.

There is absolutely nothing in the complaint from which these facts can be ascertained.

Suppose no receiver had been appointed, in whom would have been the right of action in the absence of special statutory authority?

The only persons who, by any possibility, could maintain such an action as this would be the creditors of the corporation. For them to maintain any action looking to the preservation of the assets of the corporation, it would be necessary for them to show either that the corporation was insolvent or that it was in danger of insolvency. But a Court taking jurisdiction of such an action in a foreign State would have to be shown that such action was necessary for the protection of the rights of the creditors and its jurisdiction would be limited to the collection of such assets as were within its jurisdiction and possibly the distribution of them among the creditors whom it found entitled thereto. It would have no right or authority to take any steps looking to the winding up of the corporation, that being a matter entirely within the jurisdiction of the State under whose laws the corporation was created.

Now it does not appear from the record in this case by what right the plaintiff maintains this action. There is nothing in the record to show with what powers the receiver was clothed or anything to show any instruction or permission of the Court which ap-

pointed him that could be made the foundation for his authority to commence this suit.

We respectfully submit that without allegations to cover these matters the complaint cannot state a cause of action.

34 Cyc. 436.

A CAUSE OF ACTION IS NOT STATED BECAUSE A RECEIVER
CANNOT SUE IN HIS OWN NAME.

All the authorities agree that under the general chancery procedure, as it exists in this country without statutory modification, a receiver as such has no authority to institute a suit for the recovery of property which he has failed to reduce to *possession*, unless by order or leave of the Court who appointed him.

Even then the action must be brought in the name of the party in whom the legal right or title to the property is vested. The receiver is regarded as a mere custodian, and not as having any legal right to the property. He is not the trustee of any express trust, but is an officer of the Court appointed for the safe keeping of money or property, which the Court itself has taken in charge for ultimate distribution among those who may be entitled according to their several and respective rights, as finally developed in the cause.

Yeager v. Wallace, 44 Pa. St. 294;

King v. Cutts, 24 Wis. 627;
Newell v. Fisher, 24 Miss. 392;
Kerr on Receivers, 192;
Manlove v. Burger, 38 Ind. 211;
Battle v. Davis, 66 N. C. 252.

In New York and some other States the powers of the receiver have been enlarged by statute, especially in regard to the institution of suits in their own names, and at their own discretion, for collecting and preserving the property committed to their care. But, in the case at bar even had the Court directed the receiver to have brought this suit in his own name it would not have helped matters, for the right or title to the things sued for remained where it was before the receiver was appointed.

A receiver in the strict sense has in his capacity as receiver no such interest, either legal or equitable, in the property in his custody as entitles him to bring an action in his own name concerning it, whether at common law, in equity, or under the code.

17 Encyc. Pl. & Pr. 807, and cases cited.

It follows from what has been said that this suit was improperly brought by the receiver in his own name unless it can be shown that the proceedings were authorized by some statutory provision of Alaska. There is no such statutory provision. In fact, the Alaska

statute is to the contrary. It provides in Chapter 3, Part IV, page 149, Carter's Code, as follows:

"Sec. 25. Action to be prosecuted in name of real party in interest. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in section twenty-seven; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.

"Sec. 27. Executor or administrator or trustee may sue. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section."

A receiver in whom title in the property is not vested is not a trustee of an express trust within the Code provision permitting such trustees to sue in their own names.

State v. Gambes, 68 Mo. 289;

Tilkus v. Munnemacher, 81 Wis. 91.

If a receiver sues upon a cause of action which did not vest in him, it is not necessary to interpose a demurrer questioning his capacity to sue. There is a difference between capacity to sue and a cause of action which is the right to relief in Court.

Ward v. Price, (N. Y.) 68 A. S. R. 790.

Assuming, however, that the plaintiff had been regularly and properly appointed and duly authorized to commence this action, we submit that it was not a proper suit to be brought by him.

This cause of action sounded *in tort*. The alleged liability of the appellants was based upon a violation of a Nevada statute, which provides, that:

“It shall not be lawful for the *trustees* or *directors* to make any dividend except from the net profits arising from the business of the corporation; nor to divide, withdraw, nor in any way pay to the stockholders, or any of them, any part of the capital stock of the company; nor to reduce the capital stock, unless in the manner prescribed in this act, or in accordance with the provisions of the certificate or articles of incorporation; and in case of any violation of the provisions of this section, the *directors* or *trustees* under whose administration the same may have happened, except those who may have caused their dissent thereto to be entered at large on the minutes of the board of directors or trustees at the time, *shall in their individual and private capacities, be jointly and severally liable to the corporation, and the creditors thereof, to the full amount so divided, withdrawn or reduced, or paid out*; provided, that this section shall not be construed to prevent a division and distribution of the capital stock of the company which shall remain, after the payment of all its debts, upon the dissolution of the corporation or the expiration of its charter; provided, also, that this section shall not prevent the retirement or conversion of either stock or bonds or the distribution of the earnings or accumulations of the corporation as provided for in the articles

or certificate of incorporation, original or amended."

Act, March 16, 1903, sec. 68.

The appellants in this action are sued in their capacity *as stockholders*.

We submit that there is nothing in the Nevada law which permits a recovery against *stockholders* for receiving a part of the capital stock by way of dividends.

While under the Nevada law the *trustees* or *directors* are in their individual and private capacity made jointly and severally liable to the corporation and the creditors thereof for a dividend made out of the capital, there is no such liability placed upon the stockholders who received the same.

The capital stock of a corporation is not a *trust fund* for the benefit of its creditors. And the so-called "trust fund" doctrine of the American Courts only becomes operative upon the corporation becoming insolvent.

There is no finding that the corporation was insolvent at the time of the declaration and payment of the dividend.

In the case of *McDonald v. Williams*, 174 U. S. 497, the Supreme Court of the United States said:

"The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover

the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back."

It will be observed that under the National Banking Act it is provided that "no *association* or *any member* thereof shall . . . withdraw or permit to be withdrawn either in the form of dividends or otherwise, any portion of its capital"; while under the Nevada statute such prohibition is limited to "*directors* or *trustees*."

If under the authority of *McDonald v. Williams, supra*, the action was not maintainable against a stockholder even with the express statutory provision in its aid, how much less maintainable is the case at bar with the Nevada statute reading as above quoted.

Appellants respectfully urge that they be granted a rehearing of this cause for the reasons above stated.

W. H. METSON,
CURTIS HILLYER,
METSON, DREW & MACKENZIE,
Attorneys for Petitioners.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
THE SOUTHERN PACIFIC COMPANY, a Cor-
poration,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

JAN 31 1917

F. D. Monckton,
Clerk.

United States
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THE UNITED STATES OF AMERICA,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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[2*]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 345—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation et al.,

Defendants.

*Page-number appearing at foot of page of original certified Transcript of Record.

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Honorable OSCAR TRIPPET, Judge of the United States District Court for the Southern District of California, Southern Division, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court before you, between the United States of America, plaintiff in error, and the Southern Pacific Company, a Corporation, defendant in error, a manifest error hath happened to the damage of the United States of America, plaintiff in error, as by said complaint appears, we being willing that error, if any hath been, should be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given that under your seal you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at San Francisco in the State of California, where said Court is [3] sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the

laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE,
Chief Justice of the United States, this 7th day of
March, 1916.

WM. M. VAN DYKE,
Clerk of the United States District Court for the
Southern District of California, Southern Di-
vision.

By Leslie S. Colyer,
Deputy Clerk.

Allowed this 7 day of March, 1916.

OSCAR A. TRIPPET,
United States District Judge.

I hereby certify that a copy of the within Writ of
Error was on the 9th day of March, 1916, lodged in
the clerk's office of the said United States District
Court, for the Southern District of California,
Southern Division, for said Defendant in Error.

WILLIAM M. VAN DYKE,
Clerk of the District Court of the United States for
the Southern District of California.

By Chas. N. Williams,
Deputy Clerk. [4]

[Endorsed]: No 345—Civil. In the District
Court of the United States for the Sou. Dist. of Cal-
ifornia, Southern Division. United States of
America vs. Southern Pacific Company. Writ of
Error. Filed Mch. 7, 1916. Wm. M. Van Dyke,
Clerk. By Leslie S. Colyer, Deputy. [5]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 345—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, et al.,

Defendants.

Citation on Writ of Error.

The United States of America, to the Southern
Pacific Company, a Corporation, Defendant in
Error, GREETING:

YOU ARE HEREBY CITED AND ADMON-
ISHED to be and appear in the United States Cir-
cuit Court of Appeals for the Ninth Circuit, at the
city of San Francisco, State of California, thirty
days from and after the day this citation bears date
pursuant to writ of error filed in the clerk's office of
the United States District Court for the Southern
District of California, Southern Division, sitting at
Los Angeles, wherein United States of America is
plaintiff in error and you are defendant in error, to
show cause, if any there be, why the judgment ren-
dered against the said plaintiff in error, as in said
writ of error mentioned, should not be corrected and
why speedy justice should not be done the parties in
that behalf.

WITNESS the Honorable OSCAR TRIPPET,
Judge of the United States District Court, this 7 day
of March, 1916.

OSCAR A. TRIPPET,
United States District Judge. [6]

[Endorsed]: No. 345—Civil. In the District
Court of the United States for the Sou. Dist. of Cal-
ifornia, Southern Division. United States of
America vs. Southern Pacific Company. Citation
in Error. Filed Mar. 7, 1916. Wm. M. Van Dyke,
Clerk. By A. D. Zimmerman, Deputy Clerk.

Received copy of the within, this 7th day of March,
1916.

HENRY T. GAGE and
W. I. GILBERT,
Atty. for Defendant. [7]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 345—CIVIL.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant. [8]

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

No. 2534

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Complaint.

Now comes the United States of America, by Albert Schoonover, United States Attorney for the Southern District of California, and brings this action on behalf of the United States against the Southern Pacific Company, a corporation organized and doing business under the laws of the State of Kentucky and having an office and place of business at Los Angeles, in the State of California; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission. [9]

FOR A FIRST CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by

limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock A. M. on February 2, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain engineer, and employee, to wit, R. N. Richardson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock A. M. on said date, to the hour of 9:50 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2784, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[10]

FOR A SECOND CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by

limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock A. M. on February 2, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employee, to wit, H. G. Dorrance to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock A. M. on said date, to the hour of 9:50 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2784, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [11]

FOR A THIRD CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by

limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock A. M. on February 2, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit, U. G. Gibson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock A. M. on said date, to the hour of 9:50 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2784, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[12]

FOR A FOURTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by

limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock A. M. on February 2, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, W. M. Kinkade, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock A. M. on said date, to the hour of 9:50 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2784, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[13]

FOR A FIFTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by

limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant beginning at the hour of 5:00 o'clock A. M. on February 2, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, C. S. Courtney, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock A. M., on said date, to the hour of 9:50 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2784, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[14]

FOR A SIXTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limit-

ing the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1425), said defendant beginning at the hour of 5:00 o'clock A. M. on February 2, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, Elmer Waitman, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock A. M. on said date, to the hour of 9:50 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2784, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[15]

FOR A SEVENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by

limiting the hours of service of employees thereon", approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 3:10 o'clock A. M. on Febru-

27

Amended Oct.
23, 1915, per
Min. Ord. Oct.
21, 1915, Leslie
S. Colyer, Dep-
uty Clerk.

ary 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California, and Los Angeles, in

said State, within the jurisdiction of this Court, required and permitted its certain engineer and employee, to wit, Charles O. Wine, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2765, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[16]

FOR AN EIGHTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the

Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 3:10 o'clock A. M. on February 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California, and Los Angeles, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employee, to wit, P. T. Sherley, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2765, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[17]

FOR A NINTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the

Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 3:10 o'clock A. M. on February 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California, and Los Angeles, in said State, within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit, U. G. Gibson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No 2765, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[18]

FOR A TENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the

Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 3:10 o'clock A. M. on February 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California, and Los Angeles, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, W. M. Kinkade, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2765, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [19]

FOR AN ELEVENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the

Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 3:10 o'clock A. M. on February 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California, and Los Angeles, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, J. E. Pettijohn, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2765, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [20]

FOR A TWELFTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the

Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 3:10 o'clock A. M. on February 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California, and Los Angeles, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, T. F. McBurney, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2765, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [21]

FOR A THIRTEENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the

Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 1:30 o'clock A. M. on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, required and permitted its certain engineer and employee, to wit, Chas. H. Winters, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:30 o'clock A. M. on said date, to the hour of 6:50 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 242, drawn by its own locomotive engine No. 2549, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [22]

FOR A FOURTEENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the

Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 1:30 o'clock A. M. on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employee, to wit, Geo. E. Hutchison, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:30 o'clock A. M. on said date, to the hour of 6:50 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 242, drawn by its own locomotive engine No. 2549, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [23]

FOR A FIFTEENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the

Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 1:30 o'clock A. M. on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit, Ben. W. Lindley, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:30 o'clock A. M. on said date, to the hour of 6:50 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 242, drawn by its own locomotive engine No. 2549, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [24]

FOR A SIXTEENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act

of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 1:30 o'clock A. M. on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, John T. Conley, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:30 o'clock A. M. on said date, to the hour of 6:50 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 242, drawn by its own locomotive engine No. 2549, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [25]

FOR A SEVENTEENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety

of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 1:30 o'clock A. M. on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, Bert F. Perry, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:30 o'clock A. M. on said date, to the hour of 6:50 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 242, drawn by its own locomotive engine No. 2549, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [26]

FOR AN EIGHTEENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting

the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 1:30 o'clock A. M. on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, James M. Jordon, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:30 o'clock A. M. on said date, to the hour of 6:50 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 242, drawn by its own locomotive engine No. 2549, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [27]

FOR A NINETEENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved

March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain engineer and employee, to wit, Charles H. Winters, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:55 o'clock A. M. on said date, to the hour of 7:00 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 1st 242, drawn by its own locomotive engine No. 2617, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [28]

FOR A TWENTIETH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of

1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employee, to wit, Wayland Ross, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:55 o'clock A. M. on said date, to the hour of 7:00 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 1st 242, drawn by its own locomotive engine No. 2617, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [29]

FOR A TWENTY-FIRST CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles,

in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit, U. G. Gibson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:55 o'clock A. M. on said date, to the hour of 7:00 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 1st 242, drawn by its own locomotive engine No. 2617, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [30]

FOR A TWENTY-SECOND CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State,

within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, W. M. Kinkade to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:55 o'clock A. M. on said date, to the hour of 7:00 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 1st 242, drawn by its own locomotive engine No. 2617, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [31]

FOR A TWENTY-THIRD CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this Court, required and permitted its certain trainman and employee, to wit,

C. S. Courtney, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:55 o'clock A. M. on said date, to the hour of 7:00 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 1st 242, drawn by its own locomotive engine No. 2617, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [32]

FOR A TWENTY-FOURTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, R. M. Sutherland to be and remain on duty as such for a longer period than sixteen consecutive hours,

to wit, from said hour of 1:55 o'clock A. M. on said date, to the hour of 7:00 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 1st 242, drawn by its own locomotive engine No. 2617, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [33]

FOR A TWENTY-FIFTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 7:30 o'clock P. M. on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain engineer and employee, to wit, E. J. Danfelter, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 7:30 o'clock P. M. on said date, to the hour of 12:25 o'clock P. M. on March 13, 1914.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 516, drawn by its own locomotive engine No. 2711, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [34]

FOR A TWENTY-SIXTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 7:30 o'clock P. M. on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employee, to wit, O. L. McConnell, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 7:30 o'clock P. M. on said date, to the hour of 12:25 o'clock P. M. on March 13, 1914.

Plaintiff further alleges that said employee, while

required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 516, drawn by its own locomotive engine No. 2711, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[37]

FOR A TWENTY-NINTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 7:30 o'clock P. M. on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, C. S. Courtney, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 7:30 o'clock P. M. on said date, to the hour of 12:25 o'clock P. M. on March 13, 1914.

Plaintiff further alleges that said employee, while

required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 516, drawn by its own locomotive engine No. 2711, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[38]

FOR A THIRTIETH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 7:30 o'clock P. M. on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, R. M. Southerland, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 7:30 o'clock P. M. on said date, to the hour of 12:25 o'clock P. M. on March 13, 1914.

Plaintiff further alleges that said employee, while

required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 516, drawn by its own locomotive engine No. 2711, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[39]

WHEREFORE, plaintiff prays judgment against said defendant in the sum of fifteen thousand dollars and its costs herein expended.

ALBERT SCHOONOVER,

United States Attorney.

HARRY R. ARCHBALD,

Asst. U. S. Atty.

[Endorsed]: No. 345—Civil. In the District Court of the United States for the So. Dist. of California, Southern Division. United States of America vs. Southern Pacific Company. Complaint. Filed Oct. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [40]

*In the District Court of the United States for the
Southern District of California, Southern Divi-
sion.*

No. 345—CIV.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Answer.

Now comes the defendant in the above-entitled action, and for its answer to plaintiff's first cause of action, admits, denies and alleges as follows:

I.

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, the said defendant, beginning at the hour of 5:00 o'clock A. M. on February 2, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain engineer and employee, to wit, R. N. Richardson to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock

A. M. on said date to the hour of 9:50 o'clock P. M., on said date, or at any time or at all.

Defendant denies that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in [41] or connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2784, said train being then and there engaged in the movement of interstate traffic, and defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements and laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S SECOND CAUSE OF ACTION, defendant admits, denies, and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant, beginning at the hour of 5:00 o'clock A. M., on February 2, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, or at any other time, or at all, required and permitted its certain fireman, and employee, to wit,

H. G. Dorrance, to be or remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock A. M. on said date, to the hour of 9:50 o'clock P. M. on said date.

Defendant denies that said employee while required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train Extra, drawn by its own locomotive engine No. 2784, said train being then or there engaged in the movement of interstate traffic. [42]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S THIRD CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 5:00 o'clock A. M., on Feb. 2d, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California and Indio,

in said State, within the jurisdiction of this court, or at any other time, or at all, required or permitted its certain conductor and employee, to wit, U. G. Gibson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 5:00 o'clock A. M. on said date, to the hour of 9:50 o'clock P. M. on said date.

Defendant denies that said employee, while required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train Extra, drawn by its own locomotive engine No. 2784, said train being then or there engaged in the movement of interstate traffic.

[43]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S FOURTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the

hour of 5:00 o'clock A. M., on Feb. 2d, 1914, upon its line of railroad at and between the station of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, or at any other time, or at all, required or permitted its certain trainman and employee, to wit, W. M. Kinkade, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 5:00 o'clock A. M. on said date, to the hour of 9:50 o'clock P. M. on said date.

Defendant denies that said employee, while required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train Extra, drawn by its own locomotive engine No. 2784, said train being then or there engaged in the movement of interstate traffic. [44]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S FIFTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress, known as "An Act to promote the safety of em-

ployees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 5:00 o'clock A. M., on Feb. 2d, 1914 upon its line of railroad at and between the stations of Los Angeles in the State of California and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain trainman and employee, to wit, C. S. Courtney, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 5:00 o'clock A. M. on said date, to the hour of 9:50 o'clock P. M. on said date.

Defendant denies that said employee, while required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train Extra drawn by its own locomotive engine No. 2784 said train being then or there engaged in the movement of interstate traffic. [45]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S SIXTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier en-

gaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 5:00 o'clock A. M., on Feb. 2d, 1914 upon its line of railroad at and between the stations of Los Angeles in the State of California and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain trainman and employee, to wit, Elmer Waitman, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 5:00 o'clock A. M. on said date, to the hour of 9:50 o'clock P. M. on said date.

Defendant denies that said employee, while required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train Extra drawn by its own locomotive engine No. 2784 said train being then or there engaged in the movement of interstate traffic. [46]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S SEVENTH

CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 3:10 o'clock A. M., on Feb. 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California and Los Angeles, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain engineer and employee, to wit, Charles O. Wine, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M. on said date.

Defendant denies that said employee, while required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train Extra drawn by its own locomotive engine No. 2765 said train being then or there engaged in the movement of interstate traffic. [47]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the re-

quirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S EIGHTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 3:10 o'clock A. M., on Feb. 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California and Los Angeles, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain fireman and employee, to wit, P. T. Sherley, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M. on said date.

Defendant denies that said employee, while required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train Extra drawn by its own locomotive engine No. 2765 said train being then or there engaged in the movement of interstate traffic. [48]

Defendant therefore says that it is not liable to the

plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S NINTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 3:10 o'clock A. M. on Feb. 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California and Los Angeles, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain conductor and employee, to wit, U. G. Gibson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M. on said date.

Defendant denies that said employee, while required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train Extra, drawn by its own locomotive engine No. 2765, said train being

then or there engaged in the movement of interstate traffic. [49]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S TENTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Denies that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 3:10 o'clock A. M., on Feb. 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California and Los Angeles, in said State, within the jurisdiction of this court, or at any other time, or at all, required or permitted its certain trainman and employee, to wit, W. M. Kinkade, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M. on said date.

Defendant denies that said employee, while required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train Extra, drawn by its own locomotive engine No. 2765, said train being

then or there engaged in the movement of interstate traffic. [50]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S ELEVENTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Denies that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 3:10 o'clock A. M., on February 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California and Los Angeles, in said State, within the jurisdiction of this court, or at any other time, or at all, required or permitted its certain trainman and employee, to wit, J. E. Pettijohn, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 3:10 o'clock A. M. on said date to the hour of 8:40 o'clock P. M. on said date.

Defendant denies that said employee, while required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train Extra, drawn by its own locomotive engine No. 2765, said train being

then or there engaged in the movement of interstate traffic. [51]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S TWELFTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Denies that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 3:10 o'clock A. M. on February 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California and Los Angeles, in said State, within the jurisdiction of this court, or at any other time, or at all, required or permitted its certain trainman and employee, to wit, T. F. McBurney, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M. on said date.

Defendant denies that said employee, while required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train Extra, drawn by its own locomotive engine No. 2765, said train being

then or there engaged in the movement of interstate traffic. [52]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S THIRTEENTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved [March 4th, 1907, this defendant beginning at the hour of 1:30 o'clock A. M. on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain engineer and employee, to wit, Chas. H. Winters, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 1:30 o'clock A. M. on said date to the hour of 6:50 o'clock P. M. on said date.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 242, drawn by its own locomotive engine No. 2549, said train being then or there engaged in the movement of interstate traffic.

[53]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S 14TH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 1:30 o'clock A. M., on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain fireman and employee, to wit, Geo. E. Hutchison, to be and

remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 1:30 o'clock A. M. on said date to the hour of 6:50 o'clock P. M. on said date.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 242 drawn by its own locomotive engine No. 2549, said train being then or there engaged in the movement of interstate traffic. [54]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S FIFTEENTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 1:30 o'clock A. M., on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm

Springs, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain conductor and employee, to wit, Ben W. Lindley, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 1:30 o'clock A. M. on said date to the hour of 6:50 o'clock P. M on said date.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 242, drawn by its own locomotive engine No. 2549, said train being then or there engaged in the movement of interstate traffic. [55]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S SIXTEENTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved

March 4th, 1907, this defendant beginning at the hour of 1:30 o'clock A. M., on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, or at any other time, or at all, required or permitted its certain trainman and employee, to wit, John T. Conley, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 1:30 o'clock A. M. on said date to the hour of 6:50 o'clock P. M. on said date.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 242, drawn by its own locomotive engine No. 2549, said train being then or there engaged in the movement of interstate traffic. [56]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S SEVENTEENTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 1:30 o'clock A. M., on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, or at any other time, or at all, required or permitted its certain trainman and employee, to wit, Bert F. Berry, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 1:30 o'clock A. M. on said date to the hour of 6:50 o'clock P. M. on said date.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 242, drawn by its own locomotive engine No. 2549, said train being then or there engaged in the movement of interstate traffic. [57]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars, or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S EIGH-

TEENTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved [March 4th, 1907, this defendant beginning at the hour of 1:30 o'clock A. M., on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, or at any other time, or at all, required or permitted its certain trainman and employee, to wit, James M. Jordon, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 1:30 o'clock A. M. on said date to the hour of 6:50 o'clock P. M. on said date.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 242, drawn by its own locomotive engine No. 2549, said train being then or there engaged in the movement of interstate traffic. [58]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars (\$500) or any other sum.

Defendant further says that the said movement

of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S NINETEENTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 1:55 o'clock A. M., on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted it certain engineer and employee, to wit, Charles H. Winters, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 1:55 o'clock A. M. on said date to the hour of 7:00 o'clock P. M. on said date.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 1st 242 drawn by its own locomotive No. 2617 said train being then or there engaged in the movement of interstate commerce. [59]

Defendant therefore says that it is not liable to

to the plaintiff in the sum of five hundred dollars (\$500) or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S TWENTIETH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain fireman and employee, to wit, Wayland Ross, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 1:55 o'clock A. M. on said date to the hour of 7:00 o'clock P. M. on said date.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 1st 242

drawn by its own locomotive No. 2617 said train being then or there engaged in the movement of interstate commerce. [60]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars (\$500) or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S TWENTY-FIRST CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain conductor and employee, to wit: U. G. Gibson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 1:55 o'clock A. M. on said date to the hour of 7:00 o'clock P. M. on said date.

Defendant denies that said employee, while so

required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 1st 242 drawn by its own locomotive No. 2617 said train being then or there engaged in the movement of interstate commerce. [61]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars (\$500) or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S 22d CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An Act to promote safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain trainman and employee, to wit, W. M. Kinkade, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said

hour of 1:55 o'clock A. M. on said date to the hour of 7:00 o'clock P. M. on said date.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 1st 242 drawn by its own locomotive No. 2617 said train being then or there engaged in the movement of interstate commerce. [62]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars (\$500) or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time if its operation.

FOR ANSWER TO PLAINTIFF'S TWENTY-THIRD CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An Act to promote safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 1:55 o'clock A. M. on March 8, 1914 upon its line of railroad at and between the stations of Los Angeles, in the State of California and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its

certain trainman and employee, to wit, C. S. Courtney, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 1:55 o'clock A. M. on said date to the hour of 7:00 o'clock P. M. on said date.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 1st 242 drawn by its own locomotive No. 2617 said train being then or there engaged in the movement of interstate commerce. [63]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars (\$500) or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S TWENTY-FOURTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An Act to promote safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 1:55 o'clock A. M. on March 8, 1914 upon its line of railroad at and between the stations of Los An-

geles, in the State of California and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain trainman and employee, to wit, R. M. Sutherland to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 1:55 o'clock A. M. on said date to the hour of 7:00 o'clock P. M. on said date.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 1st 242 drawn by its own locomotive No. 2617 said train being then or there engaged in the movement of interstate commerce. [64]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars (\$500) or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S TWENTY-FIFTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An Act to promote safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March

4th, 1907, this defendant beginning at the hour of 7:30 o'clock P. M. on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles in the State of California and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain engineer and employee, to wit, E. J. Danfelser, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 7:30 o'clock P. M. on said date to the hour of 12:25 o'clock P. M. on March 13, 1914.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 516 drawn by its own locomotive No. 2711 said train being then or there engaged in the movement of interstate commerce. [65]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars (\$500) or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S TWENTY-SIXTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress

known as "An Act to promote safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 7:30 o'clock P. M. on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain fireman and employee, to wit, O. L. McConnell, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 7:30 o'clock P. M., on said date to the hour of 12:25 o'clock P. M. on March 13, 1914.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 516 drawn by its own locomotive No. 2711, said train being then or there engaged in the movement of interstate commerce.

[66]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars (\$500) or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S TWENTY-SEVENTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier en-

gaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An Act to promote safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant beginning at the hour of 7:30 o'clock P. M. on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain conductor and employee, to wit, U. G. Gibson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 7:30 o'clock P. M. on said date to the hour of 12:25 o'clock P. M. on March 13, 1914.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 516 drawn by its own locomotive No. 2711, said train being then or there engaged in the movement of interstate commerce. [67]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars (\$500) or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S TWENTY-

EIGHTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California,

Denies that in violation of the Act of Congress known as "An Act to promote safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant, beginning at the hour of 7:30 o'clock P. M., on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of the court, or at any other time or at all, required or permitted its certain trainman and employee, to wit, W. M. Kinkade, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 7:30 o'clock P. M., on said date to the hour of 12:25 o'clock P. M. on March 13th, 1914.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 516 drawn by its own locomotive No. 2711, said train being then or there engaged in interstate commerce. [68]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars (\$500) or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S TWENTY-NINTH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California.

Denies that in violation of the Act of Congress known as "An Act to promote safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant, beginning at the hour of 7:30 o'clock P. M., on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of the court, or at any other time or at all, required or permitted its certain trainman and employee, to wit, C. S. Courtney, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 7:30 o'clock P. M., on said date to the hour of 12:25 o'clock P. M. on March 13th, 1914.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 516 drawn by its own locomotive No. 2711, said train being then or there engaged in interstate commerce. [69]

Defendant therefore says that it is not liable to the plaintiff in the sum of five hundred dollars (\$500) or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

FOR ANSWER TO PLAINTIFF'S THIRTIETH CAUSE OF ACTION, defendant admits, denies and alleges as follows:

Defendant admits that it is a common carrier engaged in interstate commerce by railroad in the State of California,

Denies that in violation of the Act of Congress known as "An Act to promote safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4th, 1907, this defendant, beginning at the hour of 7:30 o'clock P. M., on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of the Court, or at any other time or at all, required or permitted its certain trainman and employee, to wit, R. M. Sutherland, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the said hour of 7:30 o'clock P. M., on said date, to the hour of 12:25 o'clock P. M. on March 13th, 1914.

Defendant denies that said employee, while so required or permitted to be or remain on duty as aforesaid, was engaged in or connected with the movement of this defendant's train No. 516 drawn by its own locomotive No. 2711, said train being then or there engaged in interstate commerce. [70]

Defendant therefore says that it is not liable to

the plaintiff in the sum of five hundred dollars (\$500) or any other sum.

Defendant further says that the said movement of said train was such that it complied with all the requirements of the laws in force at the time of its operation.

WHEREFORE, defendant prays that plaintiff take nothing by this action, and that it recover its costs herein expended, and for such other and further relief as it may be justly entitled to in the premises.

HENRY T. GAGE,
W. I. GILBERT,
Attorneys for Defendant.

State of California,
County of Los Angeles.

W. I. Gilbert, being first duly sworn, deposes and says: That I am one of the attorneys for the defendant, Southern Pacific Company, in the above-entitled action; that I have read the within and foregoing Answer and know the contents thereof, and that the same is true of my own knowledge except as to those matters which are therein stated upon information or belief, and as to those matters, I believe it to be true.

That he makes this verification for the reason that the officers of said corporation are absent from the County of Los Angeles, State of California.

W. I. GILBERT.

Subscribed and sworn to before me this the 4th day of June, A. D. 1915.

[Seal]

C. F. CABLE,

Notary Public, in and for the County of Los Angeles, State of California. [71]

[Endorsed]: Original. No. 345—Civil. In the United States District Court, Southern District of California, Southern Division. United States of America, Plaintiff, vs. Southern Pacific Company, Defendant. Answer. Service of the within Answer is hereby admitted this 4th day of June, 1915. Clyde R. Moody, Asst. U. S. Atty., Attorney for Plaintiff. Filed June 4, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Henry T. Gage & W. I. Gilbert, 1208—10 Merchants Nat'l Bank Bldg., Sixth and Spring Streets, Los Angeles, Cal., Attorneys for Defendant. [72]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 345—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Amended Answer.

Defendant, by leave of Court first had and ob-

tained, answers the declaration of plaintiff as follows, to wit:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant, beginning at the hour of five o'clock A. M., of February 2, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, and within the jurisdiction of this court, required or permitted its engineer, R. N. Richardson, to be or remain on duty longer than sixteen consecutive hours, to wit, from the hour of five o'clock A. M. of said date to the hour of nine o'clock and fifty minutes (9.50) P. M. of said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum. [73]

3. Further answering, defendant alleges that the employee named in said count went on duty in the service of defendant at 5:45 A. M. of February 2, 1914, in charge of defendant's train, as alleged in plaintiff's complaint, and proceeded in charge of said train to the station of Colton, California, at which time said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as trainman, but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of any duty in connection with

his employment by said defendant for a period of one hour and thirty minutes; that said station at Colton is equipped with a restroom; that the trains operated by the employee named herein as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said Richardson was a member.

II.

For answer to plaintiff's second cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers thereon," approved March 4, 1907, the said defendant, beginning at the hour of five o'clock A. M. on February 2, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted its certain fireman, and employee, to wit, H. G. Dorance, to be and remain on duty as such for a longer period of sixteen consecutive [74] hours, to wit, from the hour of five o'clock A. M. of said date to the hour of 9:50 P. M. of said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the

employees named in said count were on duty in the service of defendant at 5:45 A. M. of February 2, 1914, in the capacity of fireman on said train, as alleged in plaintiff's complaint, and proceeded thereon to the station of Colton, California, at which time said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as fireman, or in any other capacity but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of any duty in connection with his employment by said defendant for a period of one hour and thirty minutes; that said station at Colton is equipped with a restroom; that the trains operated by the employee named herein as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said Dorrance was a member.

III.

For answer to plaintiff's third cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant, [75] beginning at the hour of five o'clock A. M., of February 2, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of Califor-

nia, and Indio, in said State, and within the jurisdiction of this court, required or permitted its conductor, U. G. Gibson, to be or remain on duty longer than sixteen consecutive hours, to wit, from the hour of five o'clock A. M. of said date to the hour of nine o'clock and fifty minutes P. M. of said date.

2. Defendant denies that by reason of the alleged violation of said act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said count went on duty in the service of defendant at 9:45 A. M. of February 2, 1914, in charge of defendant's train, as alleged in plaintiff's complaint, and proceeded in charge of said train to the station of Colton, California, at which time said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as conductor, but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of any duty in connection with his employment by said defendant for a period of one hour and thirty minutes; that said station at Colton is equipped with a restroom; that the trains operated by the employee named herein as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said Gibson was a member. [76]

IV.

For answer to plaintiff's fourth cause of action

herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant, beginning at the hour of five o'clock A. M., of February 2, 1914, upon its lines of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted *it* certain trainman and employee, to wit, W. M. Kinkade, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the hour of five o'clock A. M. of said date to the hour of 9:50 P. M. of said date.

2. Defendant denies that by reason of the alleged violation of said act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said count went on duty in the service of defendant at 9:45 A. M. of February 2, 1914, in the capacity of trainman on defendant's train, as alleged in plaintiff's complaint, and proceeded on said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not [77] called upon to perform any duty in connection with his service as conductor, but was permitted to follow the suggestions of himself; that he was en-

tirely relieved from the performance of any duty in connection with his employment by defendant for a period of one hour and thirty minutes; that said station at Colton is equipped with a restroom that the trains operated by the employee named herein as soon as they reach the yards at Colton, are delivered to the yardcrews and all work in connection with said trains is performed by crews entirely independent of the crews of which said Gibson was a member. [78]

V.

For answer to plaintiff's fifth cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant, beginning at the hour of five o'clock A. M., of February 2, 1914, upon its lines of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted *it* certain trainman and employee, to wit, C. S. Courtney, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the hour of five o'clock A. M. of said date to the hour of 9:50 P. M. of said date.

2. Defendant denies that by reason of the alleged violation of said act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said count went on duty in the service of defendant at 9:45 A. M. of February 2, 1914, in the capacity of trainman on defendant's train, as alleged in plaintiff's complaint, and proceeded on said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not [79] called upon to perform any duty in connection with his service as conductor, but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of any duty in connection with his employment by defendant for a period of one hour and thirty minutes; that said station at Colton is equipped with a restroom; that the trains operated by the employee named herein as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said Gibson was a member. [80]

VI.

For answer to plaintiff's sixth cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant, beginning at the hour of five o'clock A. M., of February 2, 1914, upon its lines of railroad at and between the

stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, or at any other time or at all, required or permitted *it* certain trainman and employee, to wit, Elmer Waitman, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from the hour of five o'clock A. M. of said date to the hour of 9:50 P. M. of said date.

2. Defendant denies that by reason of the alleged violation of said act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said count went on duty in the service of defendant at 9:45 A. M. of February 2, 1914, in the capacity of trainman on defendant's train, as alleged in plaintiff's complaint, and proceeded on said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not [81] called upon to perform any duty in connection with his service as conductor, but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of any duty in connection with his employment by defendant for a period of one hour and thirty minutes; that said station at Colton is equipped with a restroom; that the trains operated by the employee named herein as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said Gibson was a member. [82]

For answer to plaintiff's seventh cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant beginning at the hour of 3:10 A. M. of February 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California, and Los Angeles, in said State, within the jurisdiction of this court, required or permitted its certain engineer and employee, to wit, Chas. O. Wine, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 3:10 A. M. of February 22, 1914, in the capacity of engineer on defendant's train, as alleged in plaintiff's complaint, and proceeded on said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as engineer [83] but was permitted to

follow the suggestions of himself; that he was entirely relieved from the performance of any duty in connection with his employment by defendant for a period of one hour and thirty minutes; that said station at Colton is equipped with a restroom; that the trains upon which the employee named herein was employed as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said Chas. O. Wine was a member.

4. And for a second and further defense, defendant alleges that all of the operation of the defendant's train, was interfered with by an unprecedented rainfall, which so injured and damaged defendant's tracks that it was impossible for said defendant to operate its trains in such manner as to comply with the rules and regulations relative to the sixteen-hour law; that said flood was unexpected, was an act of God, and could not in any manner be guarded against by this defendant. [84]

VIII.

For answer to plaintiff's eighth cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant beginning at the hour of 3:10 A. M. of February 22, 1914, upon its line of railroad at and between the stations of

Indio, in the State of California, and Los Angeles, in said State, within the jurisdiction of this court, required or permitted its certain fireman and employee, to wit, P. T. Sherley, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 3:10 A. M. of February 22, 1914, in the capacity of fireman on defendant's train, as alleged in plaintiff's complaint, and proceeded on said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as fireman [85] but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of any duty in connection with his employment by defendant for a period of one hour and thirty minutes that said station at Colton is equipped with a restroom; that the trains upon which the employee named herein was employed as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with said trains is performed by crews entirely inde-

pendent of the crews of which said P. T. Sherley was a member.

4. And for a second and further defense, defendant alleges that all of the operation of the defendant's train was interfered with by an unprecedented rainfall, which so injured and damaged defendant's tracks that it was impossible for said defendant to operate its trains in such manner as to comply with the rules and regulations relative to the sixteen-hour law that said flood was unexpected was an act of God, and could not in any manner be guarded against by this defendant. [86].

IX.

For answer to plaintiff's ninth cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant beginning at the hour of 3:10 A. M. of February 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California, and Los Angeles, in said State, within the jurisdiction of this court, required or permitted its certain conductor and employee to wit, U. G. Gibson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged

violation of said act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 3:10 A. M. of February 22, 1914, in the capacity of conductor on defendant's train, as alleged in plaintiff's complaint, and proceeded on said train to the station of Colton, California, at which place said employee was given a full and absolute release during which time he was not called upon to perform any duty in connection with his service as conductor [87] but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of any duty in connection with his employment by defendant for a period of one hour and thirty minutes; that said station at Colton is equipped with a restroom; that the trains upon which the employee named herein was employed as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said U. G. Gibson was a member.

4. And for a second and further defense, defendant alleges that all of the operation of the defendant's train, was interfered with by an unprecedented rainfall, which so injured and damaged defendant's tracks that it was impossible for said defendant to operate its trains in such manner as to comply with the rules and regulations relative to the sixteen-hour law; that said flood was unexpected, was an act of

God, and could not in any manner be guarded against by this defendant. [88]

X.

For answer to plaintiff's tenth cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant beginning at the hour of 3:10 o'clock A. M. of February 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California, and Los Angeles, in said State, within the jurisdiction of this court required or permitted its certain trainman and employee, to wit, W. M. Kinkade, to be and remain on duty as such for a longer period than sixteen consecutive hours to wit, from said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 3:10 o'clock A. M. of February 22, 1914, in the capacity of trainman on defendant's train, as alleged in plaintiff's complaint, and proceeded on said train to the station of Colton, California, at which place said employee was given

a full and absolute release, during time *time* he was not called upon to perform any duty in connection with [89] his service as trainman, but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of any duty in connection with his employment by defendant for a period of one hour and thirty minutes; that said station at Colton is equipped with a restroom; that the trains upon which the employee named herein was employed as soon as they reach the yards at Colton are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said W. M. Kinkade was a member.

4. For a second and further defense, defendant alleges that all of the operation of the defendant's train was interfered with by an unprecedented rainfall, which so injured and damaged defendant's tracks that it was impossible for said defendant to operate its trains in such manner as to comply with the rules and regulations relative to the sixteen-hour law; that said flood was unexpected, was an Act of God, and could not in any manner be guarded against by this defendant. [90]

XI.

For answer to plaintiff's XI cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant beginning

at the hour of 3:10 o'clock A. M. of February 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California, and Los Angeles, in said State, within the jurisdiction of this court, required or permitted its certain trainman and employee, to wit, J. E. Pettijohn, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 3:10 o'clock A. M. of February 22, 1914, in the capacity of trainman on defendant's train, as alleged in plaintiff's complaint, and proceeded on said train to the station of Colton, California, at which place said employee was given a full and absolute release, during time *time* he was not called upon to perform any duty in connection with [91] his service as trainman, but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of any duty in connection with his employment by defendant for a period of one hour and thirty minutes; that said station at Colton is equipped with a restroom; that the trains upon which the employee named herein was employed as soon as they reach the yards at Colton are delivered to the yard crews and all work

in connection with said trains is performed by crews entirely independent of the crews of which said Pettijohn was a member.

4. For a second and further defense, defendant alleges that all of the operation of the defendant's train, was interfered with by an unprecedented rainfall, which so injured and damaged defendant's tracks that it was impossible for said defendant to operate its trains in such manner as to comply with the rules and regulations relative to the sixteen-hour law; that said flood was unexpected, was an act of God, and could not in any manner be guarded against by this defendant. [92]

XII.

For answer to plaintiff's XII cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant beginning at the hour of 3:10 o'clock A. M. of February 22, 1914, upon its line of railroad at and between the stations of Indio, in the State of California, and Los Angeles, in said State, within the jurisdiction of this court, required or permitted its certain trainman and employee, to wit, T. F. McBurney, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 3:10 o'clock A. M. on said date, to the hour of 8:40 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 3:10 o'clock A. M. of February 22, 1914, in the capacity of trainman on defendant's train, as alleged in plaintiff's complaint, and proceeded on said train to the station of Colton, California, at which place said employee was given a full and absolute release, during time *time* he was not called upon to perform any duty in connection with [93] his service as trainman, but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of any duty in connection with his employment by defendant for a period of one hour and thirty minutes; that said station at Colton is equipped with a restroom; that the trains upon which the employee named herein was employed as soon as they reach the yards at Colton are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said McBurney was a member.

4. For a second and further defense, defendant alleges that all of the operation of the defendant's train, was interfered with by an unprecedented rainfall, which so injured and damaged defendant's tracks that it was impossible for said defendant to operate its trains in such manner as to comply with the rules and regulations relative to the sixteen-hour

law that said flood was unexpected, was an act of God, and could not in any manner be guarded against by this defendant. [94]

XIII.

For answer to plaintiff's thirteenth cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant, beginning at the hour of 1:30 o'clock A. M. on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, required or permitted its certain engineer and employee, to wit, Chas. H. Winters, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:30 o'clock A. M. on said date, to the hour of 6:50 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 1:30 o'clock A. M. of said date in the capacity of engineer and proceeded with said train to the station of Colton, California,

at which time said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as trainman; but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of [95] any duty in connection with his employment by said defendant for a period of one hour and twenty minutes; that said station of Colton is equipped with a restroom; that the trains operated by the employee named herein as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said employee was a member. [96].

XIV.

For answer to plaintiff's fourteenth cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant, beginning at the hour of 1:30 o'clock A. M. on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, required or permitted its certain fireman and employee, to wit, Geo. E. Hitchison, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour

of 1:30 o'clock A. M. on said date, to the hour of 6:50 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 1:30 o'clock A. M. of said date in the capacity of fireman and proceeded with said train to the station of Colton, California, at which time said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as trainman; but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of [97] any duty in connection with his employment by said defendant for a period of one hour and twenty minutes; that said station of Colton is equipped with a restroom; that the trains operated by the employee named herein as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said employee was a member. [98]

XV.

For answer to plaintiff's fifteenth cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety

of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant, beginning at the hour of 1:30 o'clock A. M. on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, required or permitted its certain conductor and employee, to wit, *Be. W. Lindley*, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:30 o'clock A. M. on said date, to the hour of 6:50 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 1:30 o'clock A. M. of said date in the capacity of conductor and proceeded with said train to the station of Colton, California, at which time said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as trainman; but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of [99] any duty in connection with his employment by said defendant for a period of one hour and twenty minutes; that said station of Colton is equipped with a restroom; that the trains operated by the employee named herein

as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said employee was a member. [100]

XVI.

For answer to plaintiff's sixteenth cause of action, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant, beginning at the hour of 1:30 o'clock A. M., on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, required or permitted its certain trainman and employee, to wit, John T. Conley, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:30 o'clock A. M. on said date, to the hour of 6:50 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 1:30 o'clock A. M. of said date in the capacity of trainman and proceeded with said train to the station of Colton,

California, at which time said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as trainman, but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of any duty in [101] connection with his employment by said defendant for a period of one hour and twenty minutes; that said station of Colton is equipped with a restroom; that the trains operated by the employee named herein, as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said employee was a member. [102]

XVII.

For answer to plaintiff's seventeenth cause of action, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant, beginning at the hour of 1:30 o'clock A. M., on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, required or permitted its certain trainman and employee, to wit, Bert F. Perry, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said

hour of 1:30 o'clock A. M. on said date, to the hour of 6:50 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 1:30 o'clock A. M. of said date in the capacity of trainman and proceeded with said train to the station of Colton, California, at which time said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as trainman, but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of any duty in [103] connection with his employment by said defendant for a period of one hour and twenty minutes; that said station of Colton is equipped with a restroom; that the trains operated by the employee named herein, as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said employee was a member. [104]

XVIII.

For answer to plaintiff's eighteenth cause of action, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the act of Congress known as "An Act to promote the safety

of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant, beginning at the hour of 1:30 o'clock A. M., on February 24, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Palm Springs, in said State, within the jurisdiction of this court, required or permitted its certain trainman and employee, to wit, James J. Jordan, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:30 o'clock A. M. on said date, to the hour of 6:50 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 1:30 o'clock A. M. of said date in the capacity of trainman and proceeded with said train to the station of Colton, California, at which time said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as trainman, but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of any duty in [105] connection with his employment by said defendant for a period of one hour and twenty minutes; that said station of Colton is equipped with a restroom; that the trains operated by the employee

named herein, as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with said trains is performed by crews entirely independent of the crews of which said employee was a member. [106]

XIX.

For answer to plaintiff's nineteenth cause of action, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, said defendant, beginning at the hour of 1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles in the State of California, and Indio, in said State, within the jurisdiction of this court, required or permitted its certain engineer and employee, to wit, Chas. H. Winters, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:55 o'clock A. M. on said date, to the hour of 7:00 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 1:55 A. M. of said date in the capacity of engineer and proceeded with said train to the station of Colton, California, at which place said employee was given

a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as engineer, but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance [107] of any duty in connection with his employment by said defendant for a period of one hour and twenty minutes; that said station of Colton is equipped with a restroom; that the trains operated by the employee named herein as soon as they reach the yards at Colton, are delivered by the yard crews and all work in connection with the said trains is performed by crews entirely independent of the crews of which said employee was a member. [108]

XX.

For answer to plaintiff's twentieth cause of action, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant, beginning at the hour of 1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required or permitted its certain fireman and employee, to wit, Wayland Ross, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:55 o'clock

A. M. on said date, to the hour of 7:00 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 1:55 A. M. of said date in the capacity of fireman and proceeded with said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as fireman, but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance [109] of any duty in connection with his employment by said defendant for a period of one hour and twenty minutes; that said station of Colton is equipped with a restroom; that the trains operated by the employee named herein as soon as they reach the yards at Colton, the delivered by the yard crews and all work in connection with the said trains is performed by crews entirely independent of the crews of which said employee was a member. [110]

XXI.

For answer to plaintiff's twenty-first cause of action, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the act of Congress known as "An Act to promote the safety

of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, the said defendant, beginning at the hour of 1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required or permitted its certain conductor and employee, to wit, U. G. Gibson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:55 o'clock A. M. on said date, to the hour of 7:00 o'clock P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 1:55 A. M. of said date in the capacity of conductor and proceeded with said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as conductor, but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance [111] of any duty in connection with his employment by said defendant for a period of one hour and twenty minutes; that said station of Colton is equipped with a restroom; that the trains operated by the employee named

herein as soon as they reach the yards at Colton, are delivered by the yard crews and all work in connection with the said trains is performed by crews entirely independent of the crews of which said employee was a member. [112]

XXII.

For answer to plaintiff's XXII cause of action, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, said defendant, beginning at the hour of 1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required or permitted its certain trainman and employee, to wit, W. M. Kinkade, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:55 o'clock A. M. on said date, to the hour of 7:00 P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of trainman and proceeded with said train to the station of Colton, California, at which place said employee was given a full and ab-

solute release, during which time he was not called upon to perform any duty in connection with his service as trainman but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of [113] any duty in connection with his employment by said defendant for a period of one hour and twenty minutes; that said station of Colton is equipped with a rest-room; that the trains operated by the employee named herein as soon as they reached the yards at Colton, are delivered to the yard crews and all work in connection with the said trains is performed by crews entirely independent of the crews of which said employee was a member. [114]

XXIII.

For answer to plaintiff's XXIII cause of action, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, said defendant, beginning at the hour of 1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required or permitted its certain trainman and employee to wit, C. S. Courtney to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:55 o'clock A. M. on said date, to the hour of 7:00 P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of trainman and proceeded with said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as trainman but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of [115] any duty in connection with his employment by said defendant for a period of one hour and twenty minutes; that said station of Colton is equipped with a restroom; that the trains operated by the employee named herein as soon as they reached the yards at Colton, are delivered to the yard crews and all work in connection with the said trains is performed by crews entirely independent of the crews of which said employee was a member. [116]

XXIV.

For answer to plaintiff's XXIV cause of action,

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, said defendant, beginning at the hour of 1:55 o'clock A. M. on March 8, 1914, upon its line of railroad at and be-

tween the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required or permitted its certain trainman and employee, to wit, R. M. Sutherland to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 1:55 o'clock A. M. on said date, to the hour of 7:00 P. M. on said date.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of trainman and proceeded with said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as trainman but was permitted to follow the suggestions of himself; that he was entirely relieved from the performance of [117] any duty in connection with his employment by said defendant for a period of one hour and twenty minutes; that said station of Colton is equipped with a rest-room; that the trains operated by the employee named herein as soon as they reached the yards at Colton, are delivered to the yard crews and all work in connection with the said trains is performed by crews entirely independent of the crews of which said employee was a member. [118]

XXV.

For answer to plaintiff's XXV cause of action, herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, said defendant, beginning at the hour of 7:30 o'clock P. M. on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain engineer and employee, to wit, E. J. Danfelter to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 7:30 o'clock P. M. on said date, to the hour of 12:25 o'clock P. M. on March 13, 1914.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 7:30 o'clock P. M. of said date in the capacity of engineer and proceeded with said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as engineer but was permitted to follow the

suggestions [119] of himself; that he was entirely relieved from the performance of any duty in connection with his employment by said defendant for a period of one hour; that said station of Colton is equipped with a restroom; that the trains operated by the employee named herein as soon as they reached the yards at Colton, are delivered to the yard crews and all work in connection with the said trains is performed by crews entirely independent of the crews of which said employee was a member. [120]

XXVI.

For answer to plaintiff's XXVI cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, said defendant, beginning at the hour of 7:30 o'clock P. M. on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employee, to wit, O. O. McConnell, to be and remain on duty as such for a longer than sixteen consecutive hours, to wit, from said hour of 7:30 o'clock P. M., on said date, to the hour of 12:25 o'clock P. M. on March 13, 1914.

2. Defendant denies that by reason of the alleged violation of said Act of Congress, defendant is liable

to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 7:30 o'clock P. M. of said date in the capacity of fireman and proceeded with said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as fireman, but was permitted to follow the suggestions [121] of himself; that he was entirely relieved from the performance of any duty in connection with his employment by said defendant for a period of one hour; that said station of Colton is equipped with a restroom; that the trains operated by the employee named herein, as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with the said trains is performed by crews entirely independent of the crews of which said employee was a member. [122]

XXVII.

For answer to plaintiff's XXVII cause of action herein, defendant admits, denies, and alleges as follows:

1. Defendant denies that, in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, said defendant, beginning at the hour of 7:30 o'clock P. M. on March 12, 1914,

upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit, U. G. Gibson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 7:30 o'clock P. M. on said date, to the hour of 12:25 o'clock P. M., on March 13, 1914.

2. Defendant denies that, by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other sum.

3. Further answering, defendant alleges that the employee named in said cause of action went on duty in the service of defendant at 7:30 o'clock P. M., of said date in the capacity of conductor and proceeded with said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as conductor, but was permitted to follow the suggestions [123] of himself; that he was entirely relieved from the performance of any duty in connection with his employment by said defendant for a period of one hour; that said station of Colton is equipped with a restroom; that the trains operated by the employee named herein, as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with the said trains is performed by crews entirely independent of the crews of which said employee was a member. [124]

XXVIII.

For answer to plaintiff's twenty-eighth cause of action, defendant admits, denies, and alleges as follows:

1. Defendant denies that, in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, said defendant, beginning at the hour of 7:30 o'clock P. M. on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, W. M. Kinkade, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 7:30 o'clock P. M. on said date, to the hour of 12:25 o'clock P. M. on March 13, 1914.

2. Defendant denies that, by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other amount.

3. Further answering, defendant alleges that the employee named in said cause of action, went on duty in the service of defendant at 7:30 o'clock P. M. of said date in the capacity of trainman and proceeded with said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as trainman, but was permitted to follow the

[125] suggestions of himself; that he was entirely relieved from the performance of any duty in connection with his employment by said defendant for a period of one hour; that said station of Colton is equipped with a restroom; that the trains operated by the employee named herein as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with the said trains is performed by crews entirely independent of the crews of which said employee was a member. [126]

XXIX.

For answer to plaintiff's twenty-ninth cause of action, defendant admits, denies, and alleges as follows:

I. Defendant denies that, in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, said defendant, beginning at the hour of 7:30 o'clock P. M. on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, C. S. Courtney, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 7:30 o'clock P. M.

2. Defendant denies that, by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other amount.

3. Further answering, defendant alleges that the employee named in said cause of action, went on duty in the service of defendant at 7:30 o'clock P. M. of said date in the capacity of trainman and proceeded with said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as trainman, but was permitted to follow the [127] suggestions of himself; that he was entirely relieved from the performance of any duty in connection with his employment by said defendant for a period of one hour; that said station of Colton is equipped with a restroom; that the trains operated by the employee named herein as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with the said trains is performed by crews entirely independent of the crews of which said employee was a member. [128]

XXX.

For answer to plaintiff's thirtieth cause of action, defendant admits, denies, and alleges as follows:

1. Defendant denies that, in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, said defendant, beginning at the hour of 7:30 o'clock P. M. on March 12, 1914, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Indio, in said State, within the jurisdiction of this court, required and permitted its certain trainman and

employee, to wit, R. M. Southerland, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 7:30 o'clock P. M.

2. Defendant denies that, by reason of the alleged violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred (\$500) dollars, or in any other amount.

3. Further answering, defendant alleges that the employee named in said cause of action, went on duty in the service of defendant at 7:30 o'clock P. M. of said date in the capacity of trainman and proceeded with said train to the station of Colton, California, at which place said employee was given a full and absolute release, during which time he was not called upon to perform any duty in connection with his service as trainman, but was permitted to follow the [129] suggestions of himself; that he was entirely relieved from the performance of any duty in connection with his employment by said defendant for a period of one hour; that said station of Colton is equipped with a restroom; that the trains operated by the employee named herein as soon as they reach the yards at Colton, are delivered to the yard crews and all work in connection with the said trains is performed by crews entirely independent of the crews of which said employee was a member. [130]

WHEREFORE, defendant prays that plaintiff take nothing by this action, and that it recover its costs herein expended, and for such other and fur-

ther relief as it may be justly entitled to in the premises.

HENRY T. GAGE,

W. I. GILBERT,

Attorneys for Defendant.

State of California,

County of Los Angeles,—ss.

W. I. Gilbert, being first duly sworn, deposes and says: I am one of the attorneys for defendant in the above-entitled action; that I have read the within and foregoing answer, know the contents thereof, and that the same is true of my own knowledge except as to those matters and things which are therein stated upon information or belief, and as to those matters and things, I believe it to be true.

That he makes this verification for the reason that the officers of said corporation are absent from the county of Los Angeles, State of California.

W. I. GILBERT.

Subscribed and sworn to before me this 22d day
of October, 1915.

[Seal]

C. F. CABLE,

Notary Public in and for the County of Los Angeles,
State of California. [131]

[Endorsed]: Original. No. 345—Civil. In the United States District Court, Southern District of California, Southern Division. The United States of America, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Amended Answer. Service of the within Amended Answer is hereby admitted this 23 day of October, 1915. Roscoe F.

Walter, Attorney for Plaintiff. Filed Oct. 25, 1915.
Wm. M. Van Dyke, Clerk. By Floyd S. Sisk, Deputy Clerk. Henry T. Gage and W. I. Gilbert, 1208-10 Merchants Nat'l Bank Bldg., Sixth and Spring Streets, Los Angeles, Cal., Attorneys for Defendant. [132].

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 345—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Demurrer.

Comes now the plaintiff, United States Attorney, by its attorney, Albert Schoonover, Esquire, United States Attorney for the Southern District of California, and demurs to paragraph IV of defendant's answer as to counts 7, 8, 9, 10, 11 and 12 of plaintiff's petition, for the reason that the facts and statements therein contained are not sufficient in law to constitute a defense to plaintiff's causes of action contained in said counts of said petition for the following reasons, to wit:

1st. That said paragraph IV does not allege that the alleged excess service was the result of the unprecedented rainfall and flood, set forth in said paragraph of defendant's answer.

2d. That said paragraph IV does not allege the date or dates on which said unprecedented rainfall and flood occurred.

3d. That said paragraph IV does not allege that said rainfall and flood occurred subsequent to the time of the departure of the crew in charge of defendant's train Extra [133] 2765, on February 27, 1914, from Los Angeles, in the State of California, and that such rainfall and flood could not have been foreseen by the carrier, its officers and agents in charge of said crew at the time said crew left Los Angeles on February 27, 1914.

ALBERT SCHOONOVER,

United States Attorney.

ROBERT O'CONNOR,

Assistant U. S. Attorney.

ROSCOE F. WALTER,

Special Assistant to the United States Attorney.

[Endorsed]: No. 345—Civil. In the District Court of the United States for the South. Dist. of California, Southern Division. United States of America, Plaintiff, vs. Southern Pacific Company, Defendant. Demurrer. Filed Oct. 25, 1915. Wm. M. Van Dyke, Clerk. By Floyd S. Sisk, Deputy. [134].

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 345—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY (a Corpora-
tion),

Defendant.

**Defendant's Second Amended Answer to the Ninth
Cause of Action in Plaintiff's Complaint.**

Comes now the defendant, Southern Pacific Company, leave of the Court being first had and obtained and files this its Second Amended Answer to the Ninth Cause of Action in plaintiff's complaint and for such cause of action, admits, denies, and alleges as follows:

1. Defendants adopts all of those paragraphs in its First Amended Answer, the same as if set out in full in this amendment.

2. And defendant further alleges as follows: That on the 19th, 20th, 21st and 22d days of February, A. D. 1914, a heavy and unprecedented rainfall occurred in the vicinity of the territory covered by the Southern Pacific Company's tracks between the city of Los Angeles and the city of Colton; that because and as a direct result of said rainfall, all of the track, roadbed and other track equipment of the defendant, Southern Pacific Company, became soft and uncertain and it was [135] impossible for this de-

defendant to know, with any degree of certainty the exact time within which any number of miles could be made over said track; that the said unprecedented flood was an act of God, and the exact condition of the track, roadway and roadbed of the defendant company could not be ascertained or known by said defendant, nor could the exact time which would be necessary to operate a train over said damaged track be foreseen; that it became and was necessary at the time and after the said trains left said terminal for the employees of said company to exercise their own best judgment, after being immediately upon the track, as to the length of time to be consumed by them, between given points, or the speed to be traveled by defendant's trains.

And defendant further alleges that any delay which occurred in the operation of the trains mentioned in said count of plaintiff's complaint, could not have been foreseen or guarded against by the defendant company, because of the fact that it could not be ascertained at any given point on said track, the length of time which would be consumed in reaching another given point.

HENRY T. GAGE and
W. I. GILBERT,

Attorneys for Defendant.

[Endorsed]: No. 345—Civil. In the United States District Court, Southern District of California, Southern Division. United States of America, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Defendant's Second Amended Answer to the Ninth Count of Plaintiff's Complaint.

Copy of the within Answer is hereby admitted 27th day of October, 1915. Albert Schoonover, R. F. Walter, Attorneys for Plaintiff. Filed Oct. 27, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Henry T. Gage & W. I. Gilbert, 1208-10 Merchants Nat'l Bank Bldg., Sixth and Spring Streets, Los Angeles, Cal., Attorneys for Defendant. [136]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 345—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

**Defendant's Second Amended Answer to the Ninth
Count in Plaintiff's Complaint.**

Comes now the defendant, Southern Pacific Company, leave of the Court being first had and obtained, and files this its second Amended Answer to the ninth cause of action of plaintiff's complaint, and for such amendment, admits, denies and alleges as follows:

For a second, separate and further defense to said ninth cause of action, defendant alleges that on the 19th, 20th, 21st and 22d days of February, A. D. 1914, a heavy and unprecedented rainfall occurred in the vicinity of the territory covered by the Southern

Pacific Company's tracks between the city of Los Angeles, and the city of Colton; that because and as a direct result of said rainfall, all of the track, roadbed and other track equipment of the defendant Southern Pacific Company, became soft and uncertain, and it was impossible for this defendant to know, with any degree of certainty, the exact time within which any number of miles could be made over said track; that the said unprecedented flood was an act of God, and the exact condition of the track, roadway and roadbed of the defendant could not be ascertained or known by said defendant company, [137] nor could the exact time which would be necessary to operate a train over said damaged track be foreseen; that it became and was necessary at the time and after the said trains left said terminal for the employees of said company to exercise their own best judgment, after being immediately upon the track, as to the length of time to be consumed by them, between given points, or the speed to be traveled by defendant's trains.

And defendant further alleges that any delay which occurred in the operation of the train mentioned in said count of plaintiff's complaint, could not have been foreseen or guarded against by the defendant company, because of the fact that it would not be ascertained at any given point on said track, the length of time which would be consumed in reaching another given point.

HENRY T. GAGE and
W. I. GILBERT,
Attorneys for Defendant.

[Endorsed]: Original. No. 345—Civil. In the United States District Court, Southern District of California, Southern Division. United States of America, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Defendant's Second Amended Answer to the Ninth Count of Plaintiff's Complaint. Filed Oct. 25th, 1915. Wm. M. Van Dyke, Clerk. By Floyd S. Sisk, Deputy Clerk. Henry T. Gage and W. I. Gilbert, 1208-10 Merchants Nat'l. Bank Bldg., Sixth and Spring Streets, Los Angeles, Cal., Attorneys for Defendant. [138]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 345—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Demurrer to Second Amended Answer.

Comes now the plaintiff, United States Attorney, by its attorney Albert Schoonover, Esquire, United States Attorney for the Southern District of California, and demurs to paragraphs two and three of the defendant's second amended answer to the seventh, eighth, ninth, tenth, eleventh and twelfth counts of the plaintiff's cause of action, for the reason that the facts and statements therein con-

tained are not sufficient in law to constitute a defense to plaintiff's causes of action contained in said counts of said petition, for the following reasons:

1st. That said paragraphs do not allege that the alleged excess service was the result of the unprecedented rainfall and flood that occurred on the dates mentioned in said paragraphs, to wit, the 19th, 20th, 21st and 22d days of February, 1914.

2d. That said paragraphs show the date or dates of said unprecedented rainfall and flood to have been prior to the date on which defendant's train Extra 2765, Los Angeles to Indio on February 27, 1914.

[139]

3d. That said paragraphs two and three set up facts and circumstances occurring prior to the date of the departure of said train from Los Angeles, and were known to the defendant, its officers and agents in charge of said train at the time said train left the terminal at Los Angeles and consequently do not constitute any casualty, unavoidable accident, act of God, not known to the carrier and its officers or agents in charge of said crew at the time said crew left the terminal at Los Angeles.

ALBERT SCHOONOVER,

United States Attorney.

ROBERT O'CONNOR,

Assistant U. S. Attorney.

ROSCOE F. WALTER,

Special Assistant to the United States Attorney.

[Endorsed]: Original. No. 345—Civil. U. S. Dist. Court, So. Dist. of Cal., So. Div. The United States of America vs. Southern Pacific Co. Demur-

rer. Filed Oct. 25, 1915. Wm. M. Van Dyke, Clerk.
By Floyd S. Sisk, Deputy Clerk. [140]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 345—CIVIL.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find in
favor of the defendant, Southern Pacific Company, a
corporation.

Los Angeles, Cal., Oct. 27, 1915.

GEO. F. GUY,
Foreman.

[Endorsed]: 345—Civ. U. S. Dist. Court, So.
Dist. Cal., So. Div. The United States of America,
vs. The Southern Pacific Company, a Corporation.
Verdict. Filed Oct. 27, 1915. Wm. M. Van Dyke,
Clerk. By Leslie S. Colyer, Deputy Clerk. [141]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

No. 345—CIVIL.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Judgment.

This cause coming on regularly on Thursday, the 21st day of October, 1915, being a day in the July term, A. D. 1915, of the District Court of the United States for the Southern District of California, Southern Division, to be tried by the Court and a jury to be duly impanelled; Roscoe F. Walter, Esq., Special Assistant to the U. S. Attorney General, appearing as counsel for the United States; W. I. Gilbert, Esq., appearing as counsel for the Defendant; and a jury of twelve (12) men having been duly impanelled, and the trial having been proceeded with on said 21st day of October, 1915, and the following 25th and 27th days of October, 1915; and oral and documentary evidence having been received on behalf of the respective parties; and this cause having been argued to the jury by respective counsel, and having, on said 27th day of October, 1915, been submitted to the jury for its consideration, and the jury having thereafter,

on said 27th day of October, 1915, rendered the following verdict to wit: [142]

“In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 345—CIVIL.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find in favor of the defendant, Southern Pacific Company, a corporation.

Los Angeles, Cal., Oct. 27, 1915.

GEO. F. GUY,
Foreman.”

—and the Court having ordered that Judgment be entered herein in accordance with said verdict;

NOW, THEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is considered by the Court that The United States of America, Plaintiffs herein, take nothing by this, their action, and that The Southern Pacific Company, a Corporation, defendant herein, go hereof without day.

JUDGMENT ENTERED OCTOBER 30, 1915.

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,

Deputy Clerk.

[Endorsed]: No. 345—Civil. United States District Court, Southern District of California, Southern Division. The United States of America, vs. The Southern Pacific Company. Copy of Judgment. Filed Oct. 30, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [143]

Instructions Given by the Court.

This is a civil action and not a criminal action. The complaint is divided into thirty counts, or separate causes of action, each of which alleges a separate violation of the Statute, which I will hereafter refer to. The defendant, in its answer, has denied certain allegations in the complaint. That is to say, the defendant has denied that it has violated the law in regard to keeping its employees on duty longer than sixteen consecutive hours in any period of twenty-four hours, or longer than sixteen hours in the aggregate in any twenty-four hour period.

As to the issues in the complaint denied by the answer. The burden of proving the same is upon the plaintiff. That is to say, the plaintiff must sustain such allegations by a preponderance of the evidence. A preponderance of the evidence does not mean most of the witnesses or most evidence, but it means evidence which satisfies you as to the weight thereof.

In addition to the answer denying the allegations in the complaint, the defendant has also pleaded as to counts 7, 8, 9, 10, 11 and 12, a special answer, which the defendant claims brings the case within the proviso of the Statute which I will hereafter refer to. The defendant alleges that the delay and the retention of the employees for the length of time they were retained in service at the time in question, was either caused by the act of God, or was the result of a cause not known to the defendant or its officer or agent at the time the employees left a terminal.

You need not consider this special answer until you have first determined that the plaintiff has sustained the burden of proving the facts alleged in the complaint and denied by the answer. If you determine primarily that the plaintiff has [144] sustained the burden of proof concerning the facts alleged in the complaint, then you may consider this further or special answer of the defendant. In considering this further or special answer, the defendant has to sustain the burden of proof. In other words, if the plaintiff has sustained the burden of proof as to the allegations in the complaint, and you have to consider this special answer, then you must consider whether or not the weight of the evidence preponderates in favor of this special answer.

You are instructed that by the term "act of God" is meant those effects and occurrences which proceed from natural causes and cannot be anticipated and guarded against or resisted, such as unprecedented storms or freshets, lightning, earthquake, etc. On this defense, as I have heretofore stated to you, the

defendant assumes the burden of proof to the extent that it must prove by a preponderance of evidence that the storm was of such violence and unprecedented nature that no ordinary and reasonable amount of care would have prevented the delay. Therefore, if the plaintiff has established by a preponderance of the evidence that the defendant violated the hours of service law, as alleged in the complaint, then the burden of the proof is upon the defendant to prove by a preponderance of evidence that the storm in question was of sufficient violence to have caused the delay alleged in the complaint.

The defendant also claims that the retention of the men in service was the result of the track being soft by reason of the floods, and that it could not be foreseen before the men left the terminal that this delay would occur. On that branch [145] of the answer the defendant must also show by a preponderance of the evidence that such was the fact, and that such soft track was a cause not known to the defendant or its officers or agents in charge of such employees at the time the said employees left the terminal, and it could not have been foreseen.

The law which the plaintiff claims the defendant violated, in so far as it is necessary for you to consider the same, is as follows:

“That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common car-

rier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period, shall be required or permitted to continue, or again go on duty without having had at least eight consecutive hours off duty."

There is a proviso in the law which reads as follows:

"Provided, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident, or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen." [146]

You will see that the law contemplates two classes of service as to the time employed—one class where there are sixteen consecutive hours of labor within a period of twenty-four hours. In such a case there are ten consecutive hours off duty. The other class of service is where there are sixteen hours of labor, in the aggregate, in any twenty-four hour period, in which case there must be eight consecutive hours off duty. The law, therefore, contemplates that there may be a class of service where there may be a break in the service of a shorter duration than the prescribed periods of rest of ten and eight hours, re-

spectively. Where the service is for sixteen hours in the aggregate in any twenty-four hour period, that is where the service is not sixteen consecutive hours, the off-duty periods must be such, between the periods of service, that the employee may have a reasonable opportunity for rest or recreation, as I will more particularly point out to you hereafter.

The plaintiff claims that this case falls within the first class above designated, while the defendant claims that it falls within the second class. That is to say, the defendant claims that the men were not on duty more than sixteen hours in the aggregate in the twenty-four hour period, while the plaintiff claims the men were on duty more than sixteen consecutive hours, or sixteen hours in the aggregate in a twenty-four hour period.

The plaintiff does not claim that the provision of the law in regard to having ten consecutive hours off duty, was violated, nor that the defendant violated the provision of the Act concerning eight hours off duty, as above set forth. The defendant does not claim that the period for which the employee was released from duty at Colton could either be counted as a part of [147] the ten hours off duty or of the eight hours off duty, as set forth in the law. The defendant contends that the time of release from duty, at Colton, was such a break in the hours of service that it brings the case within the second class of cases where the hours of duty shall not be more than sixteen hours in the aggregate, and claims that there were not more than sixteen hours of duty per-

formed by the employee, in the twenty-four hour period.

Under the hours of Service Act, which has been partially read to you, when several employees are kept on duty beyond the specified time of sixteen hours, a separate penalty is incurred for the detention of each employee, although by reason of the same delay of a train.

Each overworked railway employee presents towards the public a distinct source of danger, and a distinct wrong to the employee.

The wrongful act, under the Statute, is not the delay of the train, but the retention of the employee; and the principle that under one act having several consequences, which the law seeks to prevent there is but one liability attached thereto, does not apply.

An employee who is waiting for the train to move, and liable to be called, and who is not permitted to go away, is on duty within the meaning of the hours of Service Act.

The penalty under the Act, not being in the nature of a compensation to the employee but punitive and measured by the harm done, is to be determined by the Judge, and not by the jury. So if you should find for the plaintiff you need not consider the penalty. [148].

There may be cases where the release from duty of an employee of a Railroad Company, is so brief, or where the circumstances are such that the Judge may say that the claim that the continuity of the hours of service has been broken, would be a mere sham and a pretense, and the Court would not recog-

nize such a case as being a compliance with the law. On the other hand, there may be cases where the release from service of the employee, is of such length of time, and is surrounded by such circumstances that the Court could say that no fair minded man could dispute the statement that the employee had a fair and reasonable opportunity for rest and recreation, and that the law in such cases had been complied with. Then there may be other cases, where neither of these extremes exist; cases that occupy the middle ground between these extremes; cases where, although there may not be any dispute as to the facts of the case, it is necessary to apply the proven circumstances to the situation in order to determine whether or not the law has been complied with. I have decided that this case occupies the third situation described. That is to say, it falls within that twilight zone between the two extremes, as above described. I therefore instruct you that you are to apply the probative facts and the proven circumstances in this case, to the situation, and determine whether or not, during the time the employees were released, they had a reasonable and fair opportunity for rest and recreation.

In determining whether or not the men had a reasonable opportunity for rest and recreation during the time that they were released from duty, you shall take into consideration all the facts and circumstances connected with such release; whether it was a release in good faith, and whether or not the [149] men had, during the time they were released, a right to do as they pleased; whether they were masters of

their own time, and whether they really had a substantial and opportune period of rest. If you find, as aforesaid, that the release from duty at Colton, was a break in the hours of service, within the meaning of the law as I have explained it to you, then you should find for the defendant upon that issue, but if, on the other hand, you should find that the employees were not released in such a manner that they were masters of their own time and did not have a reasonable and fair opportunity for rest or recreation, you should find for the plaintiff upon that issue.

The parties have entered into a stipulation, in writing, concerning many facts involved in this case. This stipulation will be handed to you for you to take and to have with you during your consultation. This stipulation, in so far as it covers the case, is binding upon both parties and you cannot consider that anything in it is erroneous. In addition to this stipulation of facts, certain evidence has been introduced, which you will consider in connection with such stipulation, but you cannot regard such evidence as being contrary to such stipulation.

[Endorsed]: No. 345—Civil. U. S. Dist. Court, So. Dist. of Cal., So. Div. United States of America vs. Southern Pacific Co. Instructions Given by the Court. Filed Oct. 27, 1915. Wm. M. Van Dyke, Clerk. By Floyd S. Sisk, Deputy Clerk. [150]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 345—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Government's Request for Instructions.

I.

You are instructed to find for the plaintiff on each of the first six causes of the plaintiff's petition.
[151]

II.

You are instructed to find for the plaintiff on each of the counts seven to twelve, inclusive, of the plaintiff's petition.

III.

You are instructed to find for the plaintiff on each of the counts thirteen to eighteen, inclusive, of the plaintiff's petition.

IV.

You are instructed to find for the plaintiff on each of the counts nineteen to twenty-four, inclusive, of the plaintiff's petition.

5.

You are instructed to find for the plaintiff on each of the counts twenty-five to thirty, inclusive, of plaintiff's petition. [152]

6.

If you believe that the so-called releases at Colton, varying from one hour to one hour and thirty minutes were not in the nature of releases for a definite and fixed time, you are instructed that such releases did not break the continuity of the service of the employees involved. A release for an indefinite period, although it transpired that such period of inactivity amounted to as much as one hour and thirty minutes, did not break the continuity of service, within the meaning of the statute.

7.

If you believe that when the crews involved reached Colton they had not reached their terminal or the end of their run, and that they still remained the crews of their respective trains, and that the so-called releases at said point were not for a definite and fixed period, you are instructed that such releases did not effect a break in the continuity of their service.

8.

For a release to constitute a break in the service, it must be given before the period claimed begins, and must be for a definite time. [153]

9.

A release to break the continuity of service must be such that all the facts and surrounding circumstances will permit of the employees being absolutely free to come and go at will, and not so restricted that the complete enjoyment of such release may be hampered by the fear that such employee may be wanted by his employer at some particular place during each

time of release for duty in connection with his regular work. It is not sufficient that the carrier state to the employees that they are released and free to go wherever they choose, when the employee at the same time is given to understand that he shall keep himself in readiness to respond whenever called for or needed to resume regular duty.

10.

As to counts seven to twelve, inclusive, you are instructed that the heavy rains and unprecedented floods occurring on the dates shown did not excuse the carrier for keeping the employees involved on duty in excess of sixteen hours.

11.

You are instructed that for a casualty, unavoidable accident, or act of God to warrant service of employees engaged in or connected with the movement of trains in excess of sixteen hours, such cause of delay must have arisen subsequent to the time such employees left their initial terminal. [154]

12.

You are instructed that the bad condition of the defendant's railroad track, bridges and roadbed on February 27, 1914, due to the heavy rains and unprecedented floods arising on February 18, 19, 20, 21 and 22, does not justify the defendant in keeping on duty in excess of the sixteen-hour period a crew who left their initial terminal at Los Angeles on said day of February 27, 1914.

13.

You are instructed that if you find the defendant guilty on the counts involved, you have nothing what-

ever to do with the fixing of the amount of the penalty for the violation; that the matter of assessing the penalties is entirely for the consideration of the Court, and your duty only is to find whether or *nor* the employees made the basis of the various thirty counts of the plaintiff's petition, were or were not on duty in excess of sixteen hours.

ROSCOE F. WALTER,

Special Assistant to the United States Attorney.

[Endorsed]: No. 345—Civil. In the District Court of the United States, for the South. Dist. of California, Southern Division. United States of America, Plaintiff, vs. Southern Pacific Company, Defendant. Plaintiff's Request for Instructions. Filed October 27, 1915. Wm. M. Van Dyke, Clerk. By Floyd S. Sisk, Deputy. [155]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 345—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Plaintiff's Motion for a New Trial.

Comes now the United States of America, by its attorney Albert Schoonover, United States Attorney for the Southern District of California, and moves

that the verdict of the jury herein be vacated, and that the judgment of the Court be set aside and a new trial granted, for the following reasons:

First. That said verdict of the jury is not sustained by sufficient evidence.

Second. There was no testimony to sustain said verdict.

Third. That said verdict of the jury is contrary to law.

Fourth. That said verdict of the jury is contrary to the law and facts.

Fifth. That the Court erred in refusing to give plaintiff's requested instructions No. 1, to wit:

"You are requested to find for the plaintiff on each of the first six counts of the plaintiff's declaration."

Sixth. That the Court erred in refusing to give plaintiff's requested instruction No. 2, to wit: [156]

"You are requested to find for the plaintiff on each of the counts seven to twelve, inclusive, of the plaintiff's declaration."

Seventh. That the Court erred in refusing to give plaintiff's requested instructions No. 3, to wit:

"You are requested to find for the plaintiff on each of the counts thirteen to eighteen, inclusive, of the plaintiff's declaration."

Eighth. That the Court erred in refusing to give plaintiff's requested instructions No. 4, to wit:

"You are requested to find for the plaintiff on each of the counts nineteen to twenty-four, inclusive, of the plaintiff's declaration."

Ninth. That the Court erred in refusing to give plaintiff's requested instructions No. 5, to wit:

"You are requested to find for the plaintiff on each of the counts twenty-five to thirty, inclusive, of the plaintiff's declaration."

Tenth. That the Court erred in refusing to give plaintiff's requested instructions No. 6, to wit:

"If you believe that the so-called releases at Colton, varying from one hour to one hour and thirty minutes were not in the nature of releases for a definite and fixed time, you are instructed that such releases did not break the continuity of the service of the employees involved. A release for an indefinite period, although it transpired that such period of inactivity amounted to as much as one hour and thirty minutes, did not break the continuity of service within the meaning of the statute." [157]

Eleventh. That the Court erred in refusing to give plaintiff's requested instructions No. 7, to wit:

"If you believe that when the crews involved reached Colton they had not reached their terminal or the end of their run, and that they still remained the crews of their respective trains, and that the so-called releases at said point were not for a definite and fixed period, you are instructed that such releases did not effect a break in the continuity of their service."

Twelfth. That the Court erred in refusing to give plaintiff's requested instructions No. 8, to wit:

"For a release to constitute a break in the ser-

vice, it must be given before the period claimed begins, and must be for a definite time."

Thirteenth. That the Court erred in refusing to give plaintiff's requested instructions No. 9, to wit:

"A release to break the continuity of service must be such that all the facts and surrounding circumstances will permit of the employees being absolutely free to come and go at will, and not so restricted that the complete enjoyment of such release may be hampered by the fear that such employee may be wanted by his employer at some particular place during such time of release for duty in connection with his regular work. It is not sufficient that the carrier state to the employees that they are released and free to go wherever they choose, when the employee at the same time is given to understand that he shall keep himself in readiness to respond whenever called for or needed to resume regular duty." [158]

Fourteenth. That the Court erred in refusing to give plaintiff's requested instructions No. 10, to wit:

"As to counts seven to twelve, inclusive, you are instructed that the heavy rains and unprecedented floods occurring on the dates shown did not excuse the carrier for keeping the employees involved on duty in excess of sixteen hours."

Fifteenth. That the Court erred in refusing to give plaintiff's requested instructions No. 11, to wit:

"You are instructed that for a casualty, unavoidable accident, or act of God to warrant service of employees engaged in or connected with

the movement of trains in excess of sixteen hours, such cause of delay must have arisen subsequent to the time such employees left their initial terminal."

Sixteenth. That the Court erred in refusing to give plaintiff's requested instructions No. 12, to wit:

"You are requested that the bad condition of the defendant's railroad track, bridges and road-bed on February 27, 1914, due to the heavy rains and unprecedented floods arising on February 18, 19, 20, 21 and 22, does not justify the defendant in keeping on duty in excess of the sixteen-hour period a crew who left their initial terminal at Los Angeles on said day of February 27, 1914."

Seventeenth. That the Court erred in permitting defendant to file its first amended answer.

Eighteenth. That the Court erred in not sustaining plaintiff's demurrer to paragraph four of defendant's first amended answer as to counts 7, 8, 9, 10, 11 and 12 of plaintiff's petition. [159]

Nineteenth. That the Court erred in permitting defendant to file its second amended answer.

Twentieth. That the Court erred in overruling plaintiff's demurrer to paragraphs two and three of the defendant's second amended answer to the seventh, eighth, ninth, tenth, eleventh and twelfth

counts of the plaintiff's petition.

ALBERT SCHOONOVER,
United States Attorney,
ROBERT O'CONNOR,
Assistant United States Attorney,
ROSCOE F. WALTER,
Special Assistant United States Attorney,
Attorneys for Plaintiff.

[Endorsed]: No. 345—Civil. In the District Court of the United States for the South. Dist. of California, Southern Division. United States of America, Plaintiff, vs. Southern Pacific Company, Defendant. Plaintiff's Motion for New Trial. Filed Nov. 1, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [160]

*In the District Court of the United States in and for
the Southern District of California, Southern
Division.*

No. 345—CIVIL.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
THE SOUTHERN PACIFIC COMPANY,
Defendants.

Bill of Exceptions.

The above-entitled cause came on regularly for trial on Thursday, October 21, 1915, before the Honorable OSCAR TRIPPET, Judge of the above-entitled Court, and a jury impaneled and sworn,

Roscoe Walter, Esquire, Special Assistant to the United States Attorney, appearing for the plaintiff, and W. I. Gilbert, Esquire, appearing for the defendant, and the following proceedings were had and testimony taken:

The following stipulation of facts was then read in evidence (omitting title of court and cause):

“Stipulation.

IT IS HEREBY STIPULATED AND AGREED between the parties in the above-entitled cause that the defendant is and was at the times involved in the Government's declaration a corporation organized and doing business under the laws of the State of Kentucky, and a common carrier engaged in interstate commerce by railroad in the State of California;

That the trains involved in the thirty counts of the Government's declaration were, on the dates alleged, engaged in the movement of interstate commerce. [161]

As to counts one to six, inclusive, it is stipulated that the employees, made the basis of said counts, and whose names are set forth therein, went on duty in the service of the defendant company at 5 A. M. on February 2, 1914, in charge of said defendant's train Extra 2784, and that said employees in charge of said train proceeded with said train from Los Angeles, California, to Indio, in said State, at which latter point said employees were by the defendant released at the hour of 9:50 P. M. of said date; that said employees at the station of Colton, California,

were by the defendant given what was at that time designated by the defendant a release of one hour and thirty minutes; that with the exception of said one hour and thirty minutes said employees were on duty continuously on said date from the hour of 5 A. M., to the hour of 9:50 P. M.

With respect to counts seven to twelve, inclusive, it is stipulated that the employees, made the basis of said counts, and named in said counts of the Government's declaration, were on the 27th day of February, 1914, by the defendant, placed in charge of defendant's train Extra 2765 running from Indio, in the State of California, to Los Angeles, in said State, and the said crew on said date, did operate defendant's train between said points; that the said crew reported for duty at Indio, California, at 3:10 A. M. on said date and were finally relieved from duty by the defendant at 8:40 P. M. on said date at Los Angeles, California. At the station of Colton, on said date, the said crew in charge of Extra 2765 were by the defendant given what was designated by said defendant at said time a release of one hour and thirty minutes; that [162] with the exception of the time of said designated release the said crew were continuously on duty from said hour of 3 A. M. on said date to the hour of 8:40 P. M. on said date.

As to counts thirteen to eighteen, inclusive, it is stipulated that the employees named therein, and made the basis of said counts, were by the defendant placed in charge of said defendant's freight train No. 242, engine No. 2549 on February 24, 1914; that

said train crew in charge of said train were connected with the movement of said train from Los Angeles, in the State of California, to Palm Springs, in said State; that said train crew reported for duty and began service at the hour of 1:30 A. M. on said date at Los Angeles, California, and were relieved from duty by the defendant at 6:30 P. M. on said date at Palm Springs, in the State of California; that said defendant on said date gave said crew at Colton, California, what was designated at said time by said defendant a release of one hour and twenty minutes; that with the exception of the time of said designated release said employees of said defendant in charge of said train were on continuous duty from the hour of 1:30 A. M. on said date to the hour of 6:30 P. M. on said date.

As to counts nineteen to twenty-four, inclusive, it is stipulated that the employees named therein, and made the basis of said counts, were by the defendant on the 8th day of March, 1914, placed in charge of defendant's freight train 1/242, engine 2617, and said employees while in charge of said train conducted said train from the station at Los Angeles, California, to the station of Indio, in said State; that said employees went on duty on said date [163] in charge of said train at the hour of 1:35 A. M. at Los Angeles, California, and were by the defendant relieved at Indio, in said State, at the hour of 7 P. M. on said date; that said crew at the station of Colton, California, were by the defendant given what was at that time designated by the defendant a release of one hour and twenty minutes; that with the excep-

tion of said release of one hour and twenty minutes the said crew in charge of said train on March 8, 1914, were in continuous service from the hour of 1:55 A. M. to the hour of 7 P. M. on said date; that with the exception of said period of release at Colton, California, on said date said crew were in continuous service in charge of said train from the hour of 1:55 A. M. to the hour of 7 P. M. on said date.

With respect to counts twenty-five to thirty, inclusive, it is stipulated that the employees named in said counts, and made the basis of said counts, were by the defendant placed in charge of defendant's freight train 516, engine 2711 on the 12th day of March, 1914, and that said employees on said date, and the following day of March 13, 1914, conducted said train from the station of Los Angeles, California, to the station of Indio, in said State; that at the hour of 4:20 P. M. on the 13th day of March aforesaid, when said crew were at Colton, in the State of California, they were by the defendant given what was designated by said defendant on said date a release of one hour; that with the exception of said period of release said employees were in continuous service on said date from the hour of 7:30 P. M. on March 12, 1914, to the hour of 12:25 P. M. on March 13, 1914. [164]

IT IS FURTHER STIPULATED that the parties to the above-entitled cause reserve the right to introduce any further testimony relative to what occurred on said dates at Colton, California, with respect to all the facts and circumstances surround-

ing the aforesaid designated releases of said crews on said dates.

IT IS FURTHER STIPULATED between the parties hereto and to be considered as applying to each and every count in plaintiff's petition, that during the aforesaid periods of release at Colton, said train crews were not in any way called upon, and did not perform any duties in connection with their service in the movement of their said train.

ALBERT SCHOONOVER,

United States Attorney,

By ROBERT O'CONNOR,

Assistant United States Attorney,

ROSCOE F. WALTER,

Special Assistant to U. S. Attorney,

Attorneys for Plaintiff.

HENRY T. GAGE and

W. I. GILBERT,

Attorneys for Defendant."

Testimony of R. N. Richardson, for Plaintiff.

R. N. RICHARDSON, witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

My name is R. N. Richardson. I am a locomotive engineer for the Southern Pacific Company. I was such locomotive engineer for that company on February 2, 1914. I do not remember my run on that date. I would have to look up my reports. We make out a report we turn in to the Company. It is a duplicate report, a carbon of the report, that is, a duplicate carbon. It is a trip report. On this report it states the engine number, train number we

(Testimony of R. N. Richardson.)

are called to leave on and the class of train and from what station and to what station, the time we are called to leave and the [165] time we leave and the time we arrive at our terminal and the time we are relieved at our terminal. It also shows the number of hours we work. Also the number of miles and the hours, over miles, etc. We are paid on the mileage basis and for overtime after the schedule running of the train. We are paid by the hour in some cases. We have an eight-hour day and we are paid for eight hours. Above eight hours we are paid overtime in some cases, but we are paid for a full day if we only work one hour and if we work more than eight hours we are paid overtime at the rate of twelve and a half miles per hour. If we were on duty as much as sixteen hours our pay for that day would be two hundred miles, or two days pay. That would be eight hours above the regular time, eight hours overtime at the rate of twelve and a half miles an hour. Our pay for the time above the ordinary day on a run like that if we work sixteen hours would be at the same rate as the first hundred miles. If we were on duty seventeen hours our pay would be the same rate as the first hundred miles. We would be paid extra for that at the rate of twelve and a half miles an hour. I do not remember anything about what occurred on the 2d day of February, 1914, without my trip report. I have that report at home. I did not bring it with me.

Mr. GILBERT.—We have here the same record

(Testimony of R. N. Richardson.)

which he has, which I will be glad to deliver to the Government.

By the COURT (to the Witness).—Is that the report you make of that train?

WITNESS.—That is a duplicate, so far as I can tell. It says here: “Called to leave at 5:30 A. M.” I was probably on the train at 5 o’clock. It might have been 5:05 or it might have been 4:50. We are supposed to be on the train [166] thirty minutes before leaving so the carmen can try the air and inspect the train.

The COURT.—Is that the requirement of the company?

WITNESS.—Yes, sir, it is the requirement of the company to be on the train thirty minutes prior to leaving. At that time I reported in accordance with the instructions of the railroad company. I cannot say positively at what time I reported for duty on February 2, 1914. I could not say whether I reported at 5 o’clock A. M. This report says we left at 5:40. It might have been that we got on the train at 5:30. I was called to leave at 5:30. If called to leave at 5:30 in the morning, I would have to report in time to bring the engine from the round-house over to River Station. That takes from ten to fifteen minutes and the company requires us to be on the train thirty minutes prior to the time we are to leave. The rules of the company required us to leave at 5:30 that morning and so they required us to report for duty at 5:00 o’clock that morning. As near as I can remember we started according to

(Testimony of R. N. Richardson.)

the rules of the company on that morning. Some times we are delayed a little bit, probably at the roundhouse or probably a train was ahead of us so we cannot get out. I reported for duty at 5 o'clock that day and the report here says that we are called to leave on an extra freight train. We were called to leave Los Angeles, or rather River Station, at 5:30 A. M. on February 2, 1914, on engine 2784; called for extra east freight train, freight extra, and the report says we left at 5:40 A. M., ten minutes initial delay. The report also shows that we made a total of two hundred and nine miles, one hundred twenty-nine road miles or time card miles and seventy-eight over miles. The report shows we [167] were called to leave at 5:30 A. M. and arrived at Indio at 9:50 P. M.; on the time slips it shows the total number of hours on duty were sixteen hours and ten minutes, and that did not include the preparatory time of thirty minutes. That does not include the time between 5 o'clock and 5:30 A. M. we were in readiness and between 5 o'clock and 5:30 A. M. ready to start out on that trip with our engine. My fireman that day was Howard G. Durrance. He reported for duty that morning the same time that I did, at 5 o'clock. He was my fireman the entire day. I sent in a time slip for him and he was with me as fireman the entire day, the entire time I was engineer that day.

Mr. WALTER.—We offer that in evidence as U. S. Exhibit 1.

(Which said U. S. Exhibit 1 has been transported

(Testimony of R. N. Richardson.)

to this Court for inspection by this Court in accordance with Subdivision 4, Rule 14 of this Court.)

Q. (By Mr. WALTER.) Mr. Richardson, I have here U. S. Exhibit 2. Will you examine that? (Handing document to witness.)

Q. What is it, Mr. Richardson?

A. Why, this is a daily report of our train. I did not sign that daily report. It is my signature, but I don't know who signed it. I did not make that report. I do not know who made it.

Cross-examination.

By Mr. GILBERT.—It is one hundred twenty-nine miles from Los Angeles to Indio. We have a stopping place between here and Indio, called Colton. Colton is a yard where trains are made up. [168] There is an icing station there. I have no recollection of our time at Colton, how much time we spent at Colton on this trip. The only way I would have of refreshing my memory would be to get my report, my trip report, the duplicate which I have. I usually keep them at home. I think I can find that particular report. I have no recollection of how long we stayed at Colton that day. I know we were relieved from duty there for some time. We must have been relieved in order to have been on duty not more than sixteen hours and ten minutes, as the report says. As far as the running time is concerned, I know we were released at Colton for some period. Colton is a stopping place for freight trains. They make up trains. Sometimes we take a train in there and take an entire new

(Testimony of R. N. Richardson.)

train out of there. We are released sometimes two hours and a half, sometimes four hours. The trains are switched there and made up and then we go from there to Indio. When we reach this station, Colton, if there is work to be done by our train at Colton it is done by the yard crew of which I was not a member. From the time we reach the station at Colton and turn the train over to the yard crew we had no duties to perform in relation to it.

Q. (By Mr. GILBERT.) You are masters of your own time there?

A. We are released and do not even have charge of an engine. We do not have charge of our engine. We are at liberty, if we see fit, to go and play a game of ball and we are to return to our duties at a time approximately to be given us by the yard master. During this interim we are absolutely released from duty so far as the train is concerned. I have stated that I have a record in my possession which will show the length of time we were released from duty at Colton on this eight hours trip if I [169] can find that record. I usually keep them at home. That report is also reflected in the dispatcher's report showing time in and out of our train. The chief dispatcher has a duplicate of our record showing the time the train reaches and pulls out of Colton and during the time we were in Colton we were absolutely released from work.

Mr. GILBERT.—We have, if your Honor please, the train sheets which this witness says reflects the

(Testimony of R. N. Richardson.)

number of this train, which we desire to offer in evidence.

Mr. WALTER.—I would like to ask a question.

Q. (By Mr. WALTER.) You say the dispatcher has a duplicate of this report there?

A. We call it a train sheet. I believe the company keeps a copy of all of these train sheets. I could not swear that the dispatcher has a duplicate report that is exactly correct as to that particular day, February 2, until I saw the report.

Q. (By Mr. GILBERT.) In order that there may be no mistake, I will ask you this: You have no way of knowing how many hours you were actually in service during that day unless you knew how many hours?

A. No, sir, I don't know now and don't undertake to testify how many hours I was on duty that day except as shown by my testimony which I have given. I was just called out to do that work and went out and did so and came back home. My hours on that date should be exactly the same as those of the conductor. That was the regular condition of affairs at that time, that a conductor and engineer's time of service each day correspond. That was true in regard to the time affected by a release at Colton, up to the time we were relieved at our terminal. Sometimes [170] we are from five to fifteen minutes waiting at the roundhouse after the conductor registers in. In that case a conductor would be released before the engineer. When the conductor gets a train into the yard he is through with the

(Testimony of R. N. Richardson.)

train while the engineer has to deliver the train to the roundhouse which required from five to fifteen minutes usually.

Testimony of U. G. Gibson, for Plaintiff.

U. G. GIBSON, a witness called on behalf of the Government, being duly sworn, testified as follows:

My name is U. G. Gibson. I am conductor on the Southern Pacific. I have been conductor on the Southern Pacific since January of 1907. I was a conductor on the Southern Pacific on February 2, 1914. I do not remember our run on that day. This paper, United States Exhibit 3, is my trip report, in other words, time slip. That was made out and signed by me. It was made February 2, 1914, and shows that my engineer on that day was Mr. Richardson. It does not show who my fireman was. It shows my brakemen were L. A. Kincaid, Carl S. Courtney and E. Elmer Waterman. I reported for duty on that day at 5 o'clock A. M. I was finally released from duty on that day at 9:50 P. M. These brakemen were with me on that trip. My run that day was a freight train between River Station and Indio. River Station is in Los Angeles.

Mr. WALTER.—I offer in evidence U. S. Exhibit 3.

(Which said U. S. Exhibit 3 has been transported to this Court for inspection by this Court in accordance with Subdivision 4, Rule 14 of this Court.)

Q. (By Mr. WALTER.) I hand you U. S. Exhibit 2. Examine that and state what that paper is.

A. That is my train delay report for extra east

(Testimony of U. G. Gibson.)

engine [171] 2784 on February 2, 1914. It shows that the time I reported for duty that day was 5 o'clock A. M. It does not show what time I arrived at Colton that day. That report was made by me. That is my signature.

Mr. WALTER.—I offer in evidence U. S. Exhibit 2.

(Which said U. S. Exhibit 2 has been transported to this Court for inspection by this Court in accordance with Subdivision 4, Rule 14 of this court.

Q. (By Mr. WALTER.) Mr. Gibson, I show you this book. (Handing book to witness.) What is that book, Mr. Gibson?

A. It is a Southern Pacific train book which I used on the day in question, February 2.

Mr. GILBERT.—If the Court please, I might state that the defendant admits that the trains involved in this law suit were engaged in interstate commerce on the date in evidence.

Q. (By Mr. WALTER.) Mr. Gibson, I hand you this paper. State what that paper is.

A. My trip report or time slip of February 27, 1914; I was a conductor in charge of extra 2765 on February 27, 1914. The run of that train on that day was Indio to Colton as as extra 2765, from Colton to Los Angeles as first, 243. My crew was Wiley M. Kincaid, John E. Pettijohn, and Thomas F. McBurney. The engineer was Wine, but I have no recollection of the fireman. The run of me and my crew on that day was from Indio to Colton as one train and from Colton to Los Angeles as another, but

(Testimony of U. G. Gibson.)

virtually the same train. [172] We had the same engine and the same engine crew from Colton to Los Angeles as we had from Indio to Colton, but there were two different train numbers. They ran us out of Indio as an extra and from Colton to Los Angeles as the first section of a regular train. The only difference was that our train had a different number from Colton to Los Angeles from what it had from Indio to Colton. We had the same employees, the same engineer, and fireman. I reported for duty on February 27, 1914, at 3:10 A. M., and arrived at Los Angeles and tied up at 8:40 P. M. This crew accompanied me all the way through from Indio to Los Angeles.

Mr. WALTER.—We offer in evidence U. S. Exhibit 4.

(Which said U. S. Exhibit 4 has been transported to this Court for inspection by this Court in accordance with Subdivision 4, Rule 14 of this court.)

WITNESS.—(Continuing.) This paper marked U. S. Exhibit 5 is my train delay report for February 27, 1914, extra 2765 of Indio. That delay report covers the movements of the train on which this crew ran all the way through from Indio to Los Angeles. I don't know what time we arrived at Colton. The delay report does not show anything in regard to what was done at Colton that day. It does show a release at Colton from 9:50 to 12 o'clock, and it also shows to meet number 32 forty minutes of Colton. That is it shows a release from 9:50 to 12 noon and it also shows forty minutes to meet number 32. I

(Testimony of U. G. Gibson.)

understand by that that we were released at 9:50 and that would be about the time the engine would be cut off from the train and left at the engine-house, when the engine crew would get off of the engine until 12 o'clock, and the forty minutes to meet number 32, as near as I can remember from this, is included in the two hours and [173] ten minutes, this is from 9:50 to 12 o'clock noon. I am not certain what time No. 32 arrived at Colton, but it arrived between 11:20 and 11:40, as near as I can remember. As near as I can remember the hour of wait for this 32, or the 40 minutes, arose between 11, or 11:15, and 11:45. The 40 minutes wait for 32 did not begin at 9:50, it began about 11:20. I subtract from 9:50 to 12 o'clock noon the 40 minutes that we waited for 32 and according to that we were released at Colton for a period of time which would be the difference between 2 hours and 10 minutes and 40 minutes. From 9:50 to 12 noon is 2 hours and 10 minutes, and we were released at Colton the difference between 2 hours and 10 minutes and 40 minutes. All of that time from 9:50 to 12, we were not on duty. We got off duty at 9:50 and went back on duty at 12 o'clock noon. During that time we were not on duty at all. We were entirely released. I see through this now, there is two hours and ten minutes that we were released from duty there at Colton, and then there is 40 additional that we had to wait for train No. 32 after we got ready to pull out. That is, we were there at Colton 40 minutes after we were on duty. The yardmaster at Colton gave us our release.

(Testimony of U. G. Gibson.)

Either the yardmaster or the operator on duty. When the yardmaster gave us our release he usually says: "You are released for two hours," or more, whichever it might be, whichever was the case. That is the form that he gave it to us. The usual statement we get there at Colton is: "You are released for two hours," or "three hours," or whatever the case might be. It is a verbal release. I do not remember the form of the expression used on this particular day. It is very seldom the practice to give a release for any indefinite period, although [174] they would do so at times and in case of an indefinite release the form of release would be, "You are released for a call." I do not think this was the form of release on this particular day, but I am not certain. I was the conductor. If it was stated that I was released from 9:50 to 12 on that date that meant that I was off duty entirely, that I could do as I liked during that period. I could go to the caboose, go over town, and go to bed if I liked. It does not mean that my train would be ready to leave at 12 o'clock, but would be ready for me to check up at 12 o'clock, then I would begin checking at 12 o'clock. My duties in that regard were checking up the way-bills and the cars that were added to the train and taken off of the train that I brought in and added to the train I had taken out of there. I checked up the way-bills, the number of the car, the initial, and the final destination of the car. That would necessitate my going along down the train after I check up the bills, so that at that time it would depend upon the number of cars picked

(Testimony of U. G. Gibson.)

up and sent out as to how long it would take us to check up a train and our way-bills and get ready to start out. Ordinarily, I should judge, it would take about ten or fifteen minutes to do that, sometimes more, sometimes less. I don't think we had any duty that day with regard to checking the cars and way-bills, etc., and if there was any work of that kind done I must have done it and it must have been done after 12 o'clock. Sometimes, as I call it, I double up on the delays, the number of minutes, and make the delay read 40 minutes waiting for number 30, or some numbered train, and during that time I check up my way-bills and train while I am waiting. And on this particular day, if it had happened that this train was late we would not have left [175] Colton on schedule, and, of course, we would have been required to check up our train. As near as I can remember on this particular day, after I got my release I went over on Front Street and got lunch, after which I came back to the yard and went to the caboose. I don't know how long I was. Ordinarily it would take me about 20, 25 or 30 minutes to go over there and get my lunch. When I got back to the caboose I must have laid down. I had nothing to do at the time. I had my reports all finished up to the time I arrived at Colton and after I went back to the caboose I had nothing to do that I remember of. I remember on this particular day that I had all my reports checked up to the time of my arrival at Colton. I always have it that way. When I was given a release from 9:50 to 12, I had a right to go any where

(Testimony of U. G. Gibson.)

that I wanted to in that time within limits. That is within reasonable limits; what I mean by that is, not to go too far away from the yard, but where they could find me in case of necessity. It isn't the practice of the men to leave their work and go off to some other town or anything of that kind or to go to a show or anything of that kind. At least I have never went to a show or went to another town or anything of that kind when I was released there because I didn't think it was my duty to do anything of that kind. My instructions were that I was released for a certain period of time and that I had absolutely nothing to do during that time. I had no instructions in regard to the distance away from the station I might go. I had no instructions to remain within calling distance in case of necessity, but when I stated a while ago that I would be within a certain distance in case of necessity, I meant in case of emergency, such as wrecks, washouts, or anything of that kind. We were [176] at all times supposed to be within calling distance and for that reason during these releases I would stay within calling limits, which, I believe, is one mile. The requirement of the railroad is that we live within one mile of the railroad depot or station where we can be called on or if we live further away have a phone so that we can be called by phone. I didn't live at Colton. On that day I was conductor in charge of extra 2784, Los Angeles to Indio. My train was moving under orders from the dispatcher, with the superintendent's signature attached. We get one set of orders here at River

(Testimony of U. G. Gibson.)

Station yard, that is, the Los Angeles yard, before leaving, perhaps get another at Shorb, another set at Colton, and still another set at Beaumont. We had orders on that day to take this train from Los Angeles to Indio, but whether it was one, two or three sets of orders I couldn't say, but those were our orders, to conduct that train from Los Angeles to Indio and we did that. As far as I remember, the orders that I had either from River Station or Shorb were fulfilled when I arrived at Colton; at times we running orders either at River Station, that is the Los Angeles yard, or Shorb, to run extra, or run a special train or a section of a train, River Station or Shorb to Colton. Leaving Colton, we would probably get another order to run the same train from Colton to Beaumont, and the same out of Beaumont to Indio. On that day we had instructions when we left Los Angeles to take this train to Indio and I don't remember that on that day we received instructions to do anything else with reference to this train, but take it to Indio. In other words, our duty was not fulfilled until we arrived at Indio. I stated that on February 27, I was conductor on extra 2765, from Indio to Los Angeles, when I was called on [177] February 2, for extra 2784, Los Angeles to Indio. I was notified of what my run would be on that day in the form of train orders. I was given a train order when I asked for orders at River Station, that is the Los Angeles yard. I was here given a clearance card or train order stating that I was to run extra or as a certain numbered train from River Station to Col-

(Testimony of U. G. Gibson.)

ton. The call-book I signed at Los Angeles called for a certain train to leave at a certain time to go east, no certain train to leave at a certain time Lie, I book I have no instructions as to the destination of that train until I get my train orders. I did not know on that day where I was to take the train until after I had received my train orders and on February 27, 1914, with respect to 2765, I did not know until I signed the call register where I would take that train.

Mr. WALTER.—I offer in evidence U. S. Exhibit 5.

(Which said U. S. Exhibit 5 has been transported to this Court for inspection by this Court in accordance with subdivision 4, Rule 14, of this court.)

This paper, U. S. Exhibit 6, for identification, looks to me like a copy of my delay report. My signature is to it. It is my delay report sent from Indio to Los Angeles by the operator at Indio. I don't know whether I was conductor on train 242, engine 2549, Los Angeles to Palm Springs, on February 24, 1914, nor on March 8. This paper, U. S. Exhibit 7 for identification is my trip or time report for March 8, 1914. On that day I acted as conductor on train first, 242, from Los Angeles to Indio. I do not remember what our crew did on that day at Colton, but if we were released for an hour or an hour and a half or two hours, we certainly didn't do a thing in regard to the work for the [178] time that we were released for. The facts with regards to this train are the same as with regard to the first train to

(Testimony of U. G. Gibson.)

which I testified. All of the time I was under the employment of the defendant I was under instructions in regard to where I should live, that is, within a mile of the depot or to have a telephone if I lived further. During the hour and thirty minutes that I was released at Colton, I had the privilege of going over town or going to the caboose and lying down and going to sleep if I so desired. I was not under an order to conduct the movement of that train to its destination at Indio. I did not have any written orders concerning what I should do at Colton during the hour and thirty minutes. Leaving River Station or Shorb, I received written orders and did not receive any other orders when I got to Colton except a verbal order that I was released for a certain period of time. The yardmaster or operator on duty at the time gave me that order, and, as near as I can remember, all he said was, "You are released for one hour," or "two hours" as the case might be. That was the practice to do that. With respect to February 27, 1914, extra 2765, Indio to Los Angeles, I moved that train from Los Angeles to Indio under an order from the dispatcher's office on that day. That order was not annulled at Colton, but was fulfilled. When we left Shorb or River Station we got running orders to Colton, either Colton or Beaumont. During a certain period of the year, I believe the dispatcher's district extends from Los Angeles to Beaumont and Beaumont to Indio. The other periods of the year it extends from Los Angeles to Colton, Colton to Beaumont, and Beaumont to Indio. When I receive

(Testimony of U. G. Gibson.)

orders at River Station or Shorb it extends, as the case might be at different periods of the year, to Colton, or Beaumont. On all these three dates, the first thing I did when I reported for duty was to get a check of my train that I was to take out and then get [179] a check of the way-bills accompanying the cars. I signed the register or call-book at the time I reported for duty. This book, as near as I can remember, is a book with duplicate pages signed by the man called showing the time called and the time the train was due to leave. There are no oral instructions given at the time we are called as to where we shall go, except perhaps if I am called for an extra the call-boy says "Extra east at"—a certain time. With regard to February 22, I was called for extra 2784 and when he called me the boy said "Extra east at"—such a time. I don't remember the time called for. It meant that I was to leave Los Angeles on this extra at the time specified in the call to go east, not to any particular point or destination from the call-boy. I proceeded to duty in response to that call. That instruction was not revoked, and in response to that call, on that date, as near as I can remember, I went to Indio with running orders to Colton. With respect to February 27, 1914, as to extra 2765, when the boy called me he said, "West at"—such a time, and gave the time we were to leave there. I signed the call-book as to that and in response to that call, as near as I can remember, I got a check on the train and the way-bills accompanying the cars and did as instructed in train orders which

(Testimony of U. G. Gibson.)

I received later. In response to that call on that day I undoubtedly went from Indio to Los Angeles. With regard to March 8, 1914, first 242, engine 2617, I was called by the call-boy on that morning. The instructions I received over the phone in my home here in Los Angeles were "First 242 at 2:25." First 242 is a freight train and I left here 20 minutes late on a call. The run of 242 at that time was from Los Angeles to Indio. That instruction was not revoked before I got to Indio on [180] that day. Without a doubt, I got another set of orders at Colton, and still another at Beaumont but these orders did not revoke the orders given by the call-boy.

**Testimony of R. N. Richardson for Plaintiff
(Recalled).**

R. N. RICHARDSON, witness recalled on behalf of plaintiff, testified as follows.

I testified this morning that I was an engineer on 2784, Los Angeles to Indio, on February 2, 1914. On that day I was called by telephone to be engineer on this train. I presume it was the roundhouse foreman who called me. The caller said, "We want you for extra east to leave River Station at 5:30 A. M." Sometimes they tell the engine and sometimes not, but just simply state that "We want you for an extra east" at a certain time. "Extra east" means that the train is not a regular train. It does not mean as to any particular point where the train is going. Sometimes they run as far as Colton and then come back from Colton. These instructions given me over

(Testimony of R. N. Richardson.)

the telephone that day were not revoked and in response to said instructions I took the train as engineer on that day to Indio. This order that I get is simply to take a train east.

Testimony of Ben M. Lindley, for Plaintiff.

BEN M. LINDLEY, witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

My name is Ben M. Lindley. I am a freight conductor, an extra man as conductor, a brakeman as regular man, for the Southern Pacific. I have been running extra for about four years. This document, U. S. Exhibit No. 8, is commonly known as train delay report. I made that report, and that is my signature. On February 24, I was conductor on train 242, engine 2549, Los Angeles to Palm Springs. On that day [181] I was called out at River Station I was called for 2 A. M. I was at home when I was first notified. The company uses a caller and also telephones. I have a phone that I am called over. They usually give me an hour and a half time from the time I am called to the time set for the train to depart. When they call me by phone they call me for extra so and so. He would say, "We want you to take out 242 at 2 A. M." 242 is a freight train, commonly known as a through train, from Los Angeles to Indio, — is our sub-division. On that day we didn't go to Indio but went to Palm Springs. On our arrival at Colton we go in and register in the train register and also turn the way-bills of the cars

(Testimony of Ben M. Lindley.)

in the train over to the trainmaster, and he personally notified me that I would be released until called. When I arrived at Colton,—there is always more or less delay there, that is the eating station — and on arrival there I, as well as most of the men, go in and say, “Well, what is the dope? How long do you think we will be here?” That, so that we will know how much time we will have to eat. If he sees there is quite a bit of delay, he says, “You are released until called to finish the trip.” I was released there this day for an hour and thirty minutes. When I was recalled, I was called to finish the trip to Indio, eastbound. The number of the train first 242 extends as far as Yuma over our two divisions. There are two freight divisions. There are two crews work between Los Angeles and Yuma. That is train 242 is carded on our time card from Los Angeles to Yuma but when they call us to go they call up simply designating the number of the train that is called for leaving Los Angeles. But that doesn’t mean that it will always go through on that one number all the way [182] through or that we will go all the way through. On its run to Yuma the train can’t go any other way except through Indio and we went as far as Palm Springs.

Q. You had no orders revoking your instructions that you received from the call boy on that morning? Answer that question. Did you or not have any orders revoking the instructions received from the call boy on that morning?

A. I was released at Colton, which is the usual

(Testimony of Ben M. Lindley.)

thing, and a number of times when we are called for any certain train number as 242 out of Los Angeles, that number changes and possibly at Colton we would get orders to run out of there as an extra. I was relieved at Colton until further orders.

Cross-examination.

I was relieved once at Palm Springs. Palm Springs is on the main line of the Southern Pacific between Colton and Indio. I was relieved there on account of the service law, that is the 16-hour law. I had orders to go to Palm Springs and we were going over the 16-hour law, and I was relieved by wire. I had notice at Cabazon to get in the clear previous to my 16-hour limit, and be relieved at Palm Springs, which is an unusual point.

Mr. WALTER.—We offer this in evidence.

(Which said U. S. Exhibit 8 has been transported to this Court for inspection by this Court in accordance with Sub-division 4, Rule 14 of this court.)

[183]

Testimony of Charles O. Wine, for Plaintiff.

CHARLES O. WINE, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

My name is Charles O. Wine. I am a locomotive engineer for the Southern Pacific. I was in the employ of that company on February 27, 1914. I think I had extra 2745 on that day. My conductor was U. G. Gibson. The run of the train on that day was Indio to River Station, Los Angeles. River Station is in the Southern Pacific freight yards here in Los

(Testimony of Charles O. Wine.)

Angeles. I was notified on the morning of February 27, when I was called in Indio for an extra west for the first 243, or whatever it was. I think we came part way as an extra and came out of Colton as first 243. From Colton it went to River Station. I was simply called for a west-bound train. The usual run is from Indio to Los Angeles, or River Station, unless there is some reason that they turn back at Colton. I did not receive any instructions at Colton revoking my former instructions as to where I should go on that day.

Cross-examination.

I must have been released on that day on account of the 16-hour limit. According to my time slip I see I was released from the roundhouse on account of the 16-hour law, to avoid being on duty more than 16 hours. I was released at the shops. I came in by the roundhouse. [184]

Testimony of Charles H. Winters, for Plaintiff.

CHARLES H. WINTERS, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

I am an engineer for the Southern Pacific. I was such engineer on February 24, 1915. The U. S. Exhibit 9 is a report of trip I made from Los Angeles to Indio, on second 242, from Los Angeles to Palm Springs, on that day, engine No. 2617.

Q. Now, it is stipulated that you were on train No. 242, engine 2549, on February 24, 1915, Los Angeles to Palm Springs. In what way were you noti-

(Testimony of Charles H. Winters.)

fied, on that day, that you were required to take this train from Los Angeles to Palm Springs.

A. I am always called by telephone. They ring me up 2 hours before leaving time and they tell me the engine number and generally the fireman I get and generally tell me either 242 or extra east. The run of 242 was to Yuma. On its way to Yuma the train goes through Palm Springs. I don't know whether I was called for 242 on that day or just for a train at that time. I was probably called to take 242 out. I was relieved for an hour and 30 minutes at Colton but I don't remember the terms of that release. It meant that we were to be released, the watchman would take charge of the engine and we were to get off and stay away from the engine until the time was up, unless they called me. It released me from continuing the journey on 242 unless they notified me to come on. I was done then for the day's work unless they called me again. I only had instructions to go as far as Colton; with regard to rules at Colton, I had the privilege of doing anything I wanted to. As a general thing we went down and took a nap. I do not think there is any specified distance in Colton [185] within which we have to remain. We had to be back within the expiration of an hour and thirty minutes if we were called. The release for an hour and thirty minutes meant that we were finally released. They were supposed to notify me when they wanted me again. I understood that release to mean that it released us from all responsibility from the engine or anything until they

(Testimony of Charles H. Winters.)

wanted us again. We had a right to do anything we wanted to, go to bed, sit around and talk, there was nothing to do. There is a watchman stays on the engine that has charge of it in the roundhouse. We were free to do anything we saw fit to do. We could go to sleep if we wanted to. There is a bunk-house there. The bunk-house is right near to the roundhouse. There is a car there with cushions, it has a bench with cushions on it and another bench with cushions to put your feet on, and steam heat and electric lights. If I had been released for two hours instead of one hour and thirty minutes I would not understand that there would be any difference only that we could go up town and stay longer. It meant in case of an hour and thirty minutes that I should be at the roundhouse at the expiration of the hour and thirty minutes so that I could register out and when I was released I could go anywhere I wished provided I returned at the expiration of the hour and thirty minutes and I was to be back at the expiration of one hour and thirty minutes in case I was notified to go out. They have a caller there to send out and get you. They would find us any place around there, in the bunk-house asleep or up town talking. When I was released for an hour and thirty minutes we could be any place we wanted to. We had to be accessible at the expiration of the hour and thirty [186] minutes but we had a right to be any place so far as I could see. If we were going to be any distance away we would generally notify the caller. We had a right to go five or six miles away.

(Testimony of Charles H. Winters.)

When we were wanted the caller came for us. It was our duty to be in the roundhouse at the end of an hour and thirty minutes.

Mr. WALTER.—We offer in evidence U. S. Exhibit 9; also U. S. Exhibits 6 and 7.

(Which said U. S. Exhibits 9, 6 and 7 have been transported to this Court for inspection by this Court in accordance with Subdivision 4, Rule 14 of this court.)

Under that release of one hour and thirty minutes at Colton, I had the same right as I would have when I got to the end of the division to go on home. When I am released my time stops and I am released of all charge of the engine or train at all until I am called again. If I was released for an hour and thirty minutes, that is if it said released for an hour and thirty minutes, we would be expected to be back at the roundhouse at that time. I believe I was paid for that time, that hour and thirty minutes.

On March 8, 1914, I was engineer on first 242, engine 2617, Los Angeles to Indio. I went on duty at 1:55 A. M. at Los Angeles and was released at Indio at 7 P. M. I was at home when I was first notified that I would be required to be engineer on that train that day. The caller rang me up over the telephone and either called me for extra east or for 242. The run of 242 is Los Angeles to Yuma, by way of Indio.
[187]

Cross-examination.

I don't remember that I was released for any particular time, such as one hour and thirty minutes at

(Testimony of W. H. Whalen.)

Indio. On one of the trains mentioned by counsel for the government I was released at Palm Springs because of the 16-hour law, in order not to work over 16 hours.

Redirect Examination.

I say I don't know whether I was released for a definite period or not. If I was, I would be back at the roundhouse, but I don't remember the exact time. I wouldn't be positive whether I was released for a definite period on February 24, 1915, with respect to train 242, engine 2549, unless I could see some reports. It might have been a release until I was called, or a release for a definite time.

Testimony of W. H. Whalen, for Plaintiff.

W. H. WHALEN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

My name is W. H. Whalen. I am superintendent of the Los Angeles Division of the Southern Pacific. I was such superintendent February 2, 1914. I was in charge of the employees who were in charge of extra 2784, Los Angeles to Indio, on February 2, 1914. These employees were released for a period of one hour and thirty minutes at Colton on that day. The purpose of that release was to give them a rest. We did not need them there while we were doing the work. If we had not released them the hours of service would have continued. If they had not been released under the form that they were released, they probably would not [188] have reached their destination within the sixteen hours. When the release

(Testimony of W. H. Whalen.)

was given it was not given with the anticipation, necessarily, that the crew might not reach their destination within sixteen hours. We did not need them and so we gave them their freedom. That is true with regard to all these crews on these trains. All of these employees were paid for the time that they were released at Colton. With regard to the train crew in charge of extra 2784, this crew was on duty from 5 A. M. on February 2, 1914, to the hour of 9:50 P. M. on said date, and these men were paid for the entire time they were on service, including the time released. They were paid for the entire time from 5 A. M. to 9:50 P. M. With regard to extra 2765, Indio to Los Angeles, this crew went on duty at Indio at 7:10 A. M. and were released at 8:40 P. M. and these men were paid for that entire time. With regard to train 242, engine 2549, February 24, 1915, this crew went on duty at 1:30 A. M. and were released at Palm Springs at 6:30 P. M. and these men were paid for the entire time. With regard to first 242, engine 2617, on March 8, 1914, these employees went on duty at 1:55 A. M. and were released at 7:00 P. M. These employees were paid for that entire time. With regard to train 516, engine 2711, on March 13, 1914, this crew went on duty at Los Angeles at 7:30 P. M. and were released from duty at Indio the next day at 12:25 P. M. These employees were paid for that entire time. Train 816 on March 12, 1914, ran from Los Angeles to Indio. The employees on this train were notified of the fact that they would be required to handle this train from Los

(Testimony of W. H. Whalen.)

Angeles to Indio in this way: After a train dispatcher decides to run a train he will put a notice in over at the yard office and at the [189] motive power department and the call-boy will call men for Extra East, or often the train dispatcher indicates it to be 242 or 244. In this case it was 516. The run of 516 terminated at Calexico, down on the Southern Pacific south of Imperial Junction. That train went through Indio. The duty of these employees on receiving this notification that they would be required to go out on this train, No. 516, was to prepare to respond to the call, get their meals, if they desired to, and be on hand at their leaving time, ready to go. Then they were to take their respective positions on the train, the engineer, for instance would take his place on the seat in his engine and watch for the signal and when he got the signal would take hold of the throttle and start up the train. The fireman would be on the other side. They would run that train wherever the order designates. There is only one direction in which that train would run. It would naturally follow that they would take it where they were called to take it and where the order specified they would take it. Train 516 had only one place to go. They were to take it in that direction. That crew on that day proceeded to Indio and were released at Colton for an hour and thirty minutes. That meant that they were absolutely released from responsibility. I did not hear any of them testify here to-day that they were released for a definite time. When they are released they can do anything

(Testimony of W. H. Whalen.)

they see fit. When released they would probably say, "You will find me at such and such a place. I will be down at the bunk-house or at the hotel or getting lunch." At the expiration of one hour and thirty minutes. They are told, "You are released." They will say, "All right, I am going down and get some sleep," or, "All right I am going over to the lunch counter [190] and you will find me there when you want me." When these men were released they did not know when they would be called again. They might not be called for two hours or they might be called within an hour. The form is "You are released." That means that he is released from responsibility until called. It may be a release for thirty minutes, any length of time. We have released them for a period as short as twenty minutes. When a man is released, when he is notified he is released, he doesn't know anything more than that he is released. As far as I know that is true in regard to all these men involved in this case, and I am justified in saying that from my own knowledge in the usage in the transportation business. When these men were released for an hour and thirty minutes in these particular cases, that meant that they were released, that they were as free men as there is in the world, until the call-boy gets them again. The men would say, "I am going down and get some sleep," or he will say, "I will be there" or "here" or some other place. I am saying that from my own experience as an engineer.

(Testimony of W. H. Whalen.)

Cross-examination.

When a man is released at Colton he leaves and may be reached by telephone; in other words he is temporarily at home. He is turned loose. He simply gives us word where he could be found. He could go automobile riding, yes, but that would be a very unusual thing, but he could go automobile riding. He could go to a moving picture show or go and play ball and do anything he has a mind to. [191]

Redirect Examination.

I say this, that going automobile riding is an extraordinary case. I have never in my life heard of a man going automobile riding on a release. He could go, but there has got to be some understanding with him. He may say, "I will be at my home." Then he must be at his home. He must be somewhere. He might say, "I am released. I am going into the country for an automobile ride." He could go automobile riding if he would say, "Here, I leave at such a time. I will call you up and let you know where I am." It would be an extraordinary case, as I say. It is only drawing on my imagination to state that. In these particular cases when these men were released for one hour and thirty minutes they were as free as men could be. They can go anywhere they please, do as they please and be gone as long as they please. When notified they are released will say: "You will find me at such a place. I am going to the hotel." Or they may say, "I am going down and get some sleep," or "I am going to the

(Testimony of W. H. Whalen.)

lunch counter and you will find me there." If these men had gone and taken an automobile ride we would call somebody else if we could not find them. If these men had gone and taken an automobile ride and notified the man in charge that they would be found 25 miles out within an hour, we would not be able to get these men back at any minute if we wanted them in ten minutes, and if they were not there and they were not able to get them within the time needed we would call somebody else. If nobody else was available, there would be a delay. Of course those are impossible conditions. Yet the men have a right to go but [192] they would not lose their jobs. They would not be subject to suspension. We would take them to task about it. It would be a careless way to do, to go out in the country without saying where they would be. They should say, "I will be at such and such a place at such a time." If they were 50 miles away at such a time it would not be satisfactory to the railroad company. They should be where they could be called when wanted. This release is a matter of common sense. They are told, "Now you are released," and they say, "We will be found at such a place." The man wants to work, you know, he wants to do more work and the railroad company wants him, too, and the railroad company wants him to be where he is accessible when needed and wants him to tell them he will be there.

Recross-examination.

Very often when these men go into the dispatcher's office and he tells them they are released,

(Testimony of W. H. Whalen.)

it may be that the dispatcher himself does not know when these men will be needed again. He cannot look into the future any more than any one else. The men that work out of Los Angeles are required to live in Los Angeles. They would not be permitted to live in San Francisco if they pulled trains from Los Angeles to Yuma.

Mr. WALTER.—I offer in evidence U. S. Exhibit 10.

(Which said U. S. Exhibit 10 has been transported to this Court for inspection by this Court in accordance with Subdivision 4, Rule 14 of this court).

Testimony of L. G. Sloan, for Plaintiff.

L. G. SLOAN, witness called on behalf of plaintiff, being first duly sworn, testified as follows:

I am assistant superintendent of the Southern Pacific Company. I was such assistant superintendent at Los Angeles in February and March, 1914. I had supervision over the trainmen. There are certain trainmen who make what we call local runs, and there are other men who make what we call through runs. A through run is a train that would go through, such as a through freight east from here destined to El Paso. Local trains are [193] trains that do switching at all stations. We have local men that make Colton and Los Angeles, on those through trains that would run through Indio and probably up to Yuma. There were certain men that were assigned to certain classes of runs. All men are on what is known as a seniority list. The seniority list

(Testimony of L. G. Sloan.)

is their age in the service. The oldest man in the service has preference, in positions. A run is put on, or established, and it is up to bid for fifteen days and the men take their preference. If there were a run between Colton and Los Angeles, a local run, they will bid on that. After the bids are all in, the oldest man on the list who has bid for the run gets it. Through runs are what we call our chain gang crews. I know conductors Gibson and Lindley and engineers Richardson, Winter, Olwein, and Danfelter, and brakeman Kincaid, Courtney, Elmer Whitman, J. E. Pettijohn, MacBurney and Sutherland. These men ran on certain days in February and March between Los Angeles and Indio and Palm Springs. Their runs were from Los Angeles to Colton. These men were released at Palm Springs one day on account of the 16-hour law. They were assigned to what is known as a through run or chain gang and were not assigned to a local run. All trains have to have orders by which they are run. The time table train moves on its rights. They are known as regular trains. They do not have running orders but run on regular schedule orders. No. 242 is a regular train and is scheduled from Los Angeles to El Paso via Indio. For first 242 there will be a train order. That is a section of a regular train. An order would be given to the engineer to run as a first section of that train. The first is ahead of the regular section. They run on the regular block signal on this division ten minutes apart as a rule. With regard to the extra trains, they run on what are

(Testimony of L. G. Sloan.)

called regular train orders. It is up to the train dispatcher starting an extra run from Los Angeles to Indio or Indio to Los Angeles to [194] have an order controlling its run all the way through at the time it starts out. The train dispatcher being the captain of his work, it is up to him to give the orders with reference to them as he sees fit. That was the system then and that is the system now to give the first running order out of here probably to Colton. If this train went on it would get another order when it got to Colton. Extra passenger trains are run on the same kind of orders. Regular passenger trains are run on time tables if they are regular scheduled trains.

Q. Now, Mr. Sloan, it is before the Court in this case that the crews involved in this case were released on what the carrier, or the Southern Pacific Company, has designated as a release of an hour and thirty minutes. In some instances it was ten minutes. In some cases it was exactly an hour. What was the system of release at Colton followed by the Southern Pacific Company during February and March of last year?

A. They were released from duty on their arrival until they were called to leave.

Q. Until they were called?

A. Yes. "Released until called" meant that they understood they were off duty. That they are not in any way employed. They are absolutely free. And they would be called when they would be needed, just the same as for their initial trip. The release

(Testimony of L. G. Sloan.)

was for an indefinite period. With regard to the crew running from Los Angeles to Indio, when that crew got to Indio it was released. With regard to the crew running from Indio to Los Angeles, when they arrived at Los Angeles they were released. They are at their terminal. They are through. The crews would not be [195] paid for their release at Indio, because that is their terminal and would not be paid for their release at Los Angeles because that is their home terminal, but they are paid for their release at Colton. They are paid for every minute they are at Colton. That is between their terminals. That is because they had not reached their destination. The release at Colton differed from the releases at their terminals in this: At Colton they are at the middle of their run. At their terminals they are at home. They go home just like you go home, when you get through your work, when at Colton they are only released from duty. They are not needed. On arrival of the train crew at Los Angeles from Indio, they register the time of their arrival. The register always shows the exact time of their arrival at River Station, Los Angeles. It shows the conductor's and engineer's name and the engine number and the loads it has and the empties it has and the tonnage. When the crew starts out on the trip the conductors register. The engineer and fireman only register at the roundhouse. That shows the hour they report for duty.

As a general thing the register shows the previous hours of rest they had before they reported for duty.

(Testimony of L. G. Sloan.)

I have here the registers for February and March. That is the engineers and fireman's register. I have the engineer's register for February 2, 1914, of Engineer Richardson. On that date his run was extra east 2784. His fireman was Durrance. The register shows their previous rest before they started was 14 hours—each day 14 hours. I have the register here for the 24th of February, the return trip from Indio to Los Angeles of Charles H. Winters and fireman George F. Hutchison. They registered at 2 A. M. on February [196] 24, and the register shows they rested 12 hours previous to that. I have a register here for March 8, 1914, of Charles H. Winters and fireman Ross. They registered at 2:25 A. M. on that day. Their previous rest before that was 12 hours each. I have the register for March, of Danfelter, engineer, and fireman, C. L. McKinley. They registered at 8 P. M., which shows that one of them had 39 hours rest previous and the other had 12. The conductors register out of River Station, at approximately the time when they reported for duty. This register does not show the previous hours of rest the conductor and brakeman had before they started out. We have another register for that, a mimeograph form, to show the hours of service. It was a kind of an extra precaution for the purpose of giving the company information as to the amount of rest they had before starting out. In case of a run from Indio in to Los Angeles the conductor would register his time of arrival at Los Angeles and the register would show the number of

(Testimony of L. G. Sloan.)

hours rest previous. Those registers are destroyed. The time it would take a train to run from Los Angeles to Colton would be according to the density of the traffic or tonnage they would have, the time of day they left and what they would have to contend with. We have some trains that go from here to Indio in four hours. Others take seven hours. The purpose of the release granted to employees at Colton is that the trains are in the yards there probably two hours and some times three and some times four hours and there is absolutely nothing for the crews to do and we want to give them a recreation. At times we have the crews there for a much longer time than two hours, sometimes not longer than twenty minutes. We would not release them for twenty minutes. [197] Anything less than an hour is too trifling. The release is for the purpose of rest and recreation because they had nothing to do. The yard crews there do the switching. That is where they ice cars and all perishable freight. The stops at Colton are made to arrange the trains for continuing on from that point. The cars had to be switched. Any perishable fruit had to be taken and iced. Some of it had to be precooled. We have a precooling plant that which cost something like 700,000. When shippers ship their fruit they ship it with the stipulation that it be iced or precooled, which keeps it in good condition until it reaches its destination. They drive all the warm air out and keep cool air in and keep it in its natural state. That takes time. It often takes three or four hours

(Testimony of L. G. Sloan.)

to take a car out of a train and precool it and put it back in. It was very often the case at that time that the time used from Los Angeles to Indio or Indio to Los Angeles was very near the 16 hour period. If the time allowed at Colton should not be counted, the time of duty of these crews in a number of cases would have been in excess of sixteen hours. It was an order that the crews be released. That was the system. We always released those crews at Colton. We would give them rest and recreation and of course they used that time at their leisure. When necessary within the 16 hours. On each day involved here these crews were working between Los Angeles and Indio, with conductor Gibson as conductor. His brakemen were Kincaid, Courtney and Wakeman. Between February 8 and March 8, Mr. Lindley's regular runs were the same with the exception of one when he made a trip to Mojave. Regularly he ran between Los Angeles and Indio and went as far as Yuma in some cases.

The Government rests. [198]

Testimony of L. G. Sloan, for Defendant.

L. G. SLOAN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

I was on the stand a few minutes ago. Directing my attention to the date February 27, 1914, one of the charges of the United States against the Southern Pacific is working their men more than 16 hours on February 27. I have testified that I was assistant superintendent for the Los Angeles Division and

(Testimony of L. G. Sloan.)

as such handled the transportation. I remember the occasion of the flood of 1914.

Mr. WALTER.—Now, if the Court please, we have demurred to that answer as to that particular section of the—

The COURT.—Well, if the demurrer is sustained I will permit them to amend.

Q. (By Mr. GILBERT.) With reference to February 27th and the days previous to that time, you may tell the jury what the condition of your tracks was, beginning on about the 18th of February and from then on up until the 27th.

Mr. WALTER.—We object to that as immaterial. The statute says that in case of casualty, unavoidable accident or act of God, and where the delay is the result of causes not known to the officers or the crew at the time the crew left the terminal, the statute does not apply. Now, if his testimony is confined to this particular day, and it shows that this heavy rainfall and flood occurred after the crew left the terminal, we have no objection; but we do object to his testifying to the condition of the weather a week before the crew left the terminal. We think under the ruling of the United States Circuit Court of Appeals and other courts this does not apply unless these conditions arise after the crew leaves the terminal.

The COURT.—The statute is: “The provisions of this [199] act shall not apply in any case of casualty or unavoidable accident, or the act of God, nor where the delay was the result of a cause not known

(Testimony of L. G. Sloan.)

to the carrier or the officer or agent in charge of such employee at the time such employee left the terminal, and which could not have been foreseen.”

Now, of course, if this flood and rain could have been foreseen, and they knew before the train left the terminal that this accident was going to happen, this act would not apply; no doubt about that. It is as plain as A, B, C. But I think that the evidence has got to be taken so that the jury can determine the facts. It is a question for the jury whether that is a fact or not. Now, a rain may have come and it may have poured down like in the days of Noah, but the flood may not have come until after the rain was over, and the tracks may not have been washed out until after the train left the terminal. We cannot tell until the evidence is put in.

Mr. WALTER.—Now, I suggest, Your Honor, that if a rain has fallen,—I understood him to ask as to the 18th or along about that time—

The COURT.—Well, you perhaps do not understand this country. The rain may start in on Monday, and it may rain Monday and Tuesday and Wednesday, and then on Thursday there will be a flood that will wash out bridges and tear up roads and do a good deal of damage, and this rain continuing all the time, the ground gradually gets soaked up, and you can't tell where the flood is coming from. These jurors all know about this country, and they will probably take into consideration their own knowledge in regard to those conditions in this country

(Testimony of L. G. Sloan.)

and these floods, with the proof that may be offered.
[200]

Mr. WALTER.—It seems to me if the rain had fallen as far ahead as he suggests it could have been foreseen.

The COURT.—I will permit the question about the flood, and let the jury determine.

Mr. WALTER.—Exception.

(Last question read.)

Q. (By Mr. GILBERT.) Now, let your answer include the rainfall, as you remember it, and the direct damage to the equipment of the road.

Mr. WALTER.—Now, plaintiff desires to except to the admission of this testimony for the reason that the condition of the track on all these dates previous was known on the 27th day of February, 1915, and that that is in no way material to the question at issue, as to whether the train involved was delayed by a cause which could not have been foreseen at the time the crew left the terminal.

The COURT.—Now, suppose the rain had been falling for three or four days and the track was wet and soft, and the ground was soaked, and these trains leave the depot, and then there comes a cloudburst, or an unprecedented flood in some particular part of the valley, when it is easy to wash out the track or wash out the bridge: Don't you think the jury would have a right to take those things into consideration?

Mr. WALTER.—Well, it seems to me, Your Honor, if the track is already wet and soaked—

(Testimony of L. G. Sloan.)

The COURT.—Is it your idea they should not send out a train then?

Mr. WALTER.—Not at all, but if they send out trains under these conditions knowingly, unless something happens after the train leaves the terminal— [201]

The COURT.—Why, certainly something will have to happen after it leaves the terminal.

Mr. WALTER.—That is my point.

The COURT.—Well, they can't prove it all at once.

Mr. WALTER.—I understood the question to be as to the condition of the track through all these days.

The COURT.—The objection is overruled.

Mr. WALTER.—Exception.

(Last question, as amended by the succeeding answer, read to the witness.)

A. During that period we had very heavy rains, in fact one of the heaviest storms that has ever been since I have been here, in 1910.

Q. (By Mr. WALTER.) During which period?

A. The period asked for; after the 18th.

Q. After the 18th and up until when?

Mr. GILBERT.—Up to the 27th.

Mr. WALTER.—I understood you to say the time previous. You didn't restrict it to any particular time.

A. (Continuing.) And especially between Colton and Los Angeles. We were tied up by washouts in

(Testimony of L. G. Sloan.)

there. The train sheet shows the part of the division on the 27th where we hadn't got the tracks clear yet in the vicinity of Colton. Regular trains annulled account washouts. That is in the vicinity of Colton. I remember very distinctly I was in that section, and it was the fourth night that I got into bed at El Monte. During these four days and four nights I was fixing up washouts, side washes, *bead* breaks, difficulties and everything between Colton and El Monte. The morning of the 26th was the first day we got over El Monte bridge, I think, for four days. The floods washed out the approaches and took out—well, I distinctly remember setting up four bents. [202]

The morning of the 26th was the first time I got across El Monte bridge. On the 26th and 27th we moved more equipment than usual. We had to move all of this delayed freight. The storms had made the roadbed very soft and we had all kinds of slow orders, safety first being the slogan. I remember very distinctly we had one slow order in east of Ontario where the trains were not permitted to run over 25 miles an hour through that sandy country. It washed everything. We were two nights there trying to get trains for 25 miles along in there. The road bed on the side was all washed out and we would put ballast and ties and everything along just to get over it, and I see by the train sheet on the 27th that every train coming along there lost—a passenger train would lose as much as one hour from Colton to Los Angeles on account of track conditions.

(Testimony of L. G. Sloan.)

A freight train would lose—I would say if they got over to Colton from Los Angeles in less than three hours it would be an extra run. You see they have to keep clear of all those passenger trains. Now here is the Golden State Limited on the 27th. He was 50 minutes making the 30 minute run from Colton over towards Ontario on the 27th. That was the day that the other freight train was operated. All trains show a delay and lost time in there. The dispatcher's notes show the time lost on account of soft tracks, slow orders, etc. It was necessary to restrict the speed of all trains to that of safety in that vicinity, and it was many days before we got the track fixed up so that they could make anything like reasonable speed. There was no way by which it could be definitely determined by the dispatcher as to what time [203] could be made on this soft track. That was a matter which was necessarily placed largely in the discretion of the crew in actual operation. When the freight train under those conditions left Los Angeles the dispatcher couldn't tell whether he could move to Colton in six hours or nine hours. In the first place the track conditions and the slow trains he had to meet and his delays waiting for them and then other delays waiting for him when he got started over this slow trip. It was awfully slow work and delays trains something terrible. So far as I am concerned, I know of no way of foreseeing this track difficulty. I couldn't tell how much they were going to loose.

(Testimony of L. G. Sloan.)

Cross-examination.

I couldn't tell when we had the most rain. It rained day and night in there most of the time. I couldn't tell up to what time. I was out there wet from top to bottom. I was trying to fill up the holes and wasn't keeping weather records. There was quite a bit of rain on the 18th. It was something terrible. The bridge at El Monte was gotten in shape on the morning of the 26th. The flood was all about the same for several days, and part of the highest flood washed out at El Monte. The flood doesn't come and then go just at one time, but it probably rains to-night and a terrible flood and then to-morrow it will go down a little and then it will rain again. I know that along about that time we cribbed up one bridge there three times near San Gabriel. [204]

If the rain ceased along about the 23d or 24th, then the highest crest of the flood would have been before the 26th. I do not know exactly when the rain ceased. I kept a diary, but my diary does not show as to the rain.

Mr. GILBERT.—Your Honor, the Weather Bureau records will show that, and I will admit them without any proof of their correctness at all.

Mr. WALTER.—I offer in evidence U. S. Exhibit 11.

(Which said U. S. Exhibit 11 has been transported to this court for inspection by this court in accordance with Subdivision 4, Rule 14 of this court.)

(Testimony of L. G. Sloan.)

The train left Indio for Los Angeles on February 27th at 3:10 A. M. and was tied up at Los Angeles at 8:40 P. M. of that day. I do not know of anything that occurred subsequent to the departure of that train from Indio that affected its movement, except track conditions, and the condition of the track was known at the time the crew left the terminal, in a general way, but the condition of the track was not such that we could tell the exact running time. [205]

Testimony of J. B. Lippincott, for Defendant.

J. B. LIPPINCOTT, witness called on behalf of the defendants, being first duly sworn, testified as follows:

My name is J. B. Lippincott. I am a civil engineer. I have been a resident of Southern California since 1891 and have practiced my profession continuously in Southern California during that length of time. I was on the Board of Engineers to study the flood conditions of 1914 for the county. We devoted about a year and a half's time to that work, and made our report in August of this year. During my employment and the practice of my profession as civil engineer, I have had occasion to keep a record for my personal benefit of the rainfall of Southern California since 1891, and have published documents concerning them. I am familiar with flood conditions from 1891 up to date. I remember the occasion of the flood which fell beginning on February 18th and continuing up until the 21st or 22d of February, 1914. I had occasion to

(Testimony of J. B. Lippincott.)

observe the force and effect of that flood. I had occasion to compare it with other floods which have fallen in Southern California during my twenty-two years' residence here. Directing my attention to the precipitation of water which fell between the 18th of February and the 24th of February, 1914, the character of that flood as compared with other floods, bearing in mind the immediate precipitation, that is, the volume of water which fell within a restricted period as compared with other periods of a like time in years past, I would say that the rainstorm of February, 1914 according to the records of the Weather Bureau here began with great violence on the 18th of February at Los Angeles and extended until [206] the 21st of February, both inclusive. The floods that were produced by that storm in the San Gabriel Valley and in that region, according to observations which I personally made, and which were made under my immediate direction, were the greatest flood discharges that I have ever known of in this portion of California or in any other portion of California, when you consider the flood in terms of flood discharge per square mile of rain space, as we had a very, very wet month preceding, with immense floods in January. This was followed by a group of very heavy rain storms in February, falling on mountain drainage basins and valleys that were already saturated with moisture, and it produced not only great volumes of flood but great damage and washing away of river banks and so on generally. The damage on that account was very great. The region I refer to as the

(Testimony of J. B. Lippincott.)

San Gabriel Valley is the drainage basin beginning at Pasadena and extending, say to San Dimas. That portion of the mountain drainage basin. And discharging through the narrows of the San Gabriel River near El Monte. We determined the flood discharge from practically all of those drainage basins, including the flood discharge at El Monte. El Monte is on the Southern Pacific Railroad east of here. When a flood falling on the 21st of February, say, as a matter of illustration, at 3 o'clock in the afternoon on the 21st of February—the actual and direct effect of that flood does not end with the flood itself. It is very different in drainage basins. If you take a drainage basin or catchment basin of a small stream, that is, very short [207] and precipitous, you get a flood very quickly. You would get one from the Rubio Canyon or some of those other canyon or drainage basins between Pasadena and Azusa, such a flood, but when you come to the San Gabriel River, which is a drainage basin of 220 square miles in area, these floods do not respond as quickly, and they are drawn out longer in duration. If you have a country that is fairly saturated with water by protracted rains, the floods in lessor volumes are pretty well sustained.

Cross-examination.

The heaviest rains fell at Los Angeles, for instance, according to the Weather Bureau records, February, 1914, there was 4.26 inches fell on the 18th of February; .94 inches on the 19th; 1.69 on the 20th; .15 on the 21st; none on the 22d; none on the 23d; and none for the balance of the month. That is, at the Los Angeles

(Testimony of J. B. Lippincott.)

station. What we did with the flood discharge was to determine what the maximum flood waves have been during those times. The exact time when this maximum flood wave passed by we did not determine. Going on the theory that the heaviest rain fell on the 18th—going on the theory that about four inches of rain fell on that day, and the amounts I have named there on the three subsequent days, I should think the height of that flood was reached possibly within 12 or 24 hours at El Monte. Otherwise I do not know when the highest point of that flood was reached. Undoubtedly it occurred before the 22d of February. There is a Bureau of the Government with officials in [208] this building—the United States Geological Survey—that keep daily records of the flood of streams and the exact hours and days when these maximum flood waves occur can be determined. I am having those records copied now and will have them by 2 o'clock.

Redirect Examination.

I have got here the daily stream discharge of the San Gabriel River at Azusa as compiled by the United States Geological Survey, the hydrographic branch. Refreshing my recollection from it and testifying as to the conditions on the dates from the 18th of February up until the 26th or 27th, I would give it on the 17th of February. The flow of the river—

Mr. WALTER.—For the purpose of the record, I would like it to show, your Honor, that I object and have an exception.

(Testimony of J. B. Lippincott.)

The COURT.—The objection is overruled.

Mr. WALTER.—Exception.

WITNESS.—(Continuing.) The flow of the river on the 17th of February, the day prior to the rain, was 282 cubic feet per second; on the 18th it was 1750—that is the day of the big rain; on the 19th, 4540; on the 20th, 11,800; on the 21st, 8,480; on the 22d, 6,620; on the 23d, 4,710; on the 24th, 4,180; on the 25th, 2,950; on the 26th, 2,840; on the 27th, 2,500; on the 28th, 2,200. That is cubic feet per second. A cubic foot per second is 50 miner's inches. That was a very unusual flow for that stream. As far as I now remember it, that is the biggest flow ever measured on that river. I personally established that gauging station in 1896, and since that time, so far as I can now remember, that was the heaviest [209] flow that has ever gone through there since 1896.

Mr. GILBERT.—We offer in evidence Defendant's Exhibit "A." (Which said Defendant's Exhibit "A" has been transported to this Court for inspection by this Court in accordance with Subdivision 4, Rule 14 of this court.)

Cross-examination.

The flow was heaviest on the 20th, and it gradually reduced down until the 28th. On the 27th it was 2500 cubic feet per second. The condition of the stream was much better on the 27th than on the 20th.

There was no further or additional testimony introduced at the trial. The cause was then argued, and submitted, thereupon the Court gave to the jury the following instructions: [210]

Instructions of the Court to the Jury.

This is a civil action and not a criminal action. The complaint is divided into thirty counts, or separate causes of action, each of which alleges a separate violation of the Statute, which I will hereafter refer to. The defendant, in its answer, has denied certain allegations in the complaint. That is to say, the defendant has denied that it has violated the law in regard to keeping its employees on duty longer than sixteen consecutive hours in any period of twenty-four hours, or longer than sixteen hours in the aggregate in any twenty-four hour period.

As to the issues in the complaint denied by the answer. The burden of proving the same is upon the plaintiff. That is to say, the plaintiff must sustain such allegations by a preponderance of the evidence. A preponderance of the evidence does not mean most of the witnesses or most evidence, but it means evidence which satisfies you as to the weight thereof. In addition to the answer denying the allegations in the complaint, the defendant has also pleaded as to count 7, 8, 9, 10, 11 and 12, a special answer, which the defendant claims brings the case within the proviso of the Statute which I will hereafter refer to. The defendant alleges that the delay and the retention of the employees for the length of time they were retained in service at the time in question, was either caused by the act of God, or was the result of a cause not known to the defendant or its officer or agent at the time the employees left a terminal.

You need not consider this special answer until you

have first determined that the plaintiff has sustained the burden of proving the facts alleged in the complaint. [211] and denied by the answer. If you determine primarily that the plaintiff has sustained the burden of proof concerning the facts alleged in the complaint, then you may consider this further or special answer of the defendant. In considering this further or special answer, the defendant has to sustain the burden of proof. In other words, if the plaintiff has sustained the burden of proof as to the allegation in the complaint, and you have to consider this special answer, then you must consider whether or not the weight of the evidence preponderates in favor of this special answer.

You are instructed that by the term "act of God" is meant those effects and occurrences which proceed from natural causes and cannot be anticipated and guarded against or resisted, such as unprecedented storms or freshets, lightning, earthquake, etc. On this defense, as I have heretofore stated to you, the defendant assumes the burden of proof to the extent that it must prove by a preponderance of evidence that the storm was of such violence and unprecedented nature that no ordinary and reasonable amount of care would have prevented the delay. Therefore, if the plaintiff has established by a preponderance of the evidence that the defendant violated the hours of service law, as alleged in the complaint, then the burden of the proof is upon the defendant to prove by a preponderance of evidence that the storm in question was of sufficient violence to have caused the delay alleged in the complaint.

The defendant also claims that the retention of the men in service was the result of the track being soft [212] by reason of the floods, and that it could not be foreseen before the men left the terminal that this delay would occur. On that branch of the answer the defendant must also show by a preponderance of the evidence that such was the fact, and that such soft track was a cause not known to the defendant or its officers or agents in charge of such employees at the time the said employees left the terminal, and it could not have been foreseen.

The law which the plaintiff claims the defendant violated, in so far as it is necessary for you to consider the same, is as follows:

“That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period, shall be required or permitted to continue, or again go on duty without having had at least eight consecutive hours off duty.

There is a proviso in the law which reads as follows:

“Provided, That the provisions of this Act shall not apply in any case of casualty or un-

avoidable accident, or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen”:

[213]

You will see that the law contemplates two classes of service as to the time employed,—one class where there are sixteen consecutive hours of labor within a period of twenty-four hours. In such a case there are ten consecutive hours off duty. The other class of service is where there are sixteen hours of labor, in the aggregate, in any twenty-four hour period, in which case there must be eight consecutive hours off duty. The law, therefore, contemplates that there may be a class of service where there may be a break in the service of a shorter duration than the prescribed periods of rest of ten and eight hours, respectively. Where the service is for sixteen hours in the aggregate in any twenty-four hour period, that is where the service is not sixteen consecutive hours, the off-duty periods must be such, between the periods of service, that the employee may have a reasonable opportunity for rest or recreation, as I will more particularly point out to you hereafter.

The plaintiff claims that this case falls within the first class above designated, while the defendant claims that it falls within the second class. That is to say, the defendant claims that the men were not on duty more than sixteen hours in the aggregate in the twenty-four hour period, while the plaintiff claims

the men were on duty more than sixteen consecutive hours, or sixteen hours in the aggregate in a twenty-four hour period. [214]

The plaintiff does not claim that the provision of the law in regard to having ten consecutive hours off duty, was violated, nor that the defendant violated the provision of the Act concerning eight hours off duty, as above set forth. The defendant does not claim that the period for which the employee was released from duty at Colton could either be counted as a part of the ten hours off duty or of the eight hours off duty, as set forth in the law. The defendant contends that the time of release from duty, at Colton, was such a break in the hours of service that it brings the case within the second class of cases where the hours of duty shall not be more than sixteen hours in the aggregate, and claims that there were not more than sixteen hours of duty performed by the employee, in the twenty-four hour period.

Under the Hours of Service Act, which has been partially read to you, when several employees are kept on duty beyond the specified time of sixteen hours, a separate penalty is incurred for the detention of each employee, although by reason of the same delay of a train.

Each overworked railway employee presents towards the public a distinct source of danger, and a distinct wrong to the employee.

The wrongful act, under the Statute, is not the delay of the train, but the retention of the employee; and the principle that under one act having several conse-

quences, which the law seeks to prevent there is but one liability attached thereto, does not apply. [215]

An employee who is waiting for the train to move, and liable to be called, and who is not permitted to go away, is on duty within the meaning of the Hours of Service Act.

The penalty under the Act, not being in the nature of a compensation to the employee but punitive and measured by the harm done, is to be determined by the Judge, and not by the jury. So if you should find for the plaintiff you need not consider the penalty.

There may be cases where the release from duty of an employee of a railroad company, is so brief, or where the circumstances are such that the Judge may say that the claim that the continuity of the hours of service has been broken, would be a mere sham and a pretense, and the Court would not recognize such a case as being a compliance with the law. On the other hand, there may be cases where the release from the service of the employee, is of such length of time, and is surrounded by such circumstances that the Court could say that no fair-minded man could dispute the statement that the employee had a fair and reasonable opportunity for rest and recreation, and that the law in such cases had been complied with. Then there may be other cases, where neither of these extremes exist; cases that occupy the middle ground between these extremes; cases where, although there may not be any dispute as to the facts of the case, it is necessary to apply the proven circumstances to the situation in order to de-

termine whether or not the law has been complied with. I have decided that this case occupies the third situation described. That is to say, it falls within that twilight zone between the two extremes, as above described. I therefore instruct [216] you that you are to apply the probative facts and the proven circumstances in this case, to the situation, and determine whether or not, during the time the employees were released, they had a reasonable and fair opportunity for rest and recreation.

In determining whether or not the men had a reasonable opportunity for rest and recreation during the time that they were released from duty, you shall take into consideration all the facts and circumstances connected with such release; whether it was a release in good faith, and whether or not the men had, during the time they were released, a right to do as they pleased; whether they were masters of their own time, and whether they really had a substantial and opportune period of rest. If you find, as aforesaid, that the release from duty at Colton, was a break in the hours of service, within the meaning of the law as I have explained it to you, then you should find for the defendant upon that issue, but if, on the other hand, you should find that the employees were not released in such a manner that they were masters of their own time and did not have a reasonable and fair opportunity for rest and recreation, you should find for the plaintiff upon that issue.

The parties have entered into a stipulation, in writing, concerning many facts involved in this case. This stipulation will be handed to you for you to

take and to have with you during your consultation.

This stipulation, insofar as it covers the case, is binding upon both parties and you cannot consider that anything in it is erroneous. In addition to this stipulation of facts, certain evidence has been introduced, which you will consider in connection with such stipulation, but you cannot regard such evidence as being contrary to such stipulation. [217].

Thereupon the plaintiff requested the following instructions, which were refused by the Court, to which refusal of the Court the plaintiff then and there duly excepted; the grounds for said exceptions as given at that time are set out in full in the assignment of errors filed herein:

I.

You are instructed to find for the plaintiff on each of the first six causes of the plaintiff's petition.

Said plaintiff then and there, while the jury was in the box, duly excepted to the Court's refusal to give the foregoing instruction.

II.

You are instructed to find for the plaintiff on each of the counts seven to twelve, inclusive, of the plaintiff's petition.

Said plaintiff then and there, while the jury was in the box, duly excepted to the Court's refusal to give the foregoing instruction.

III.

You are instructed to find for the plaintiff on each of the counts thirteen to eighteen, inclusive, of the plaintiff's petition.

Said plaintiff then and there, while the jury was

in the box, duly excepted to the Court's refusal to give the foregoing instruction. [218]

IV.

You are instructed to find for the plaintiff on each of the counts nineteen to twenty-four, inclusive of the plaintiff's petition.

Said plaintiff then and there, while the jury was in the box, duly excepted to the Court's refusal to give the foregoing instruction.

5.

You are instructed to find for the plaintiff on each of the counts twenty-five to thirty, inclusive, of plaintiff's petition.

Said plaintiff then and there, while the jury was in the box, duly excepted to the Court's refusal to give the foregoing instruction.

6.

If you believe that the so-called releases at Colton, varying from one hour to one hour and thirty minutes were not in the nature of releases for a definite and fixed time, you are instructed that such releases did not break the continuity of the service of the employees involved. A release for an indefinite period, although it transpired that such period of inactivity amounted to as much as one hour and thirty minutes, did not break the continuity of service, within the meaning of the statute.

Said plaintiff then and there, while the jury was in the box, duly excepted to the Court's refusal to give the foregoing instruction. [219]

7.

If you believe that when the crews involved

reached Colton they had not reached their terminal or the end of their run, and that they still remained the crews of their respective trains, and that the so-called releases at said point were not for a definite and fixed period, you are instructed that such releases did not effect a break in the continuity of their service.

Said plaintiff then and there, while the jury was in the box, duly excepted to the Court's refusal to give the foregoing instruction.

8.

For a release to constitute a break in the service, it must be given before the period claimed begins, and must be for a definite time.

Said plaintiff then and there, while the jury was in the box, duly excepted to the Court's refusal to give the foregoing instruction.

9.

A release to break the continuity of service must be such that all the facts and surrounding circumstances will permit of the employees being absolutely free to come and go at will, and not so restricted that the complete enjoyment of such release may be hampered by the fear that such employee may be wanted by his employer at some particular place during such time of release for duty in connection with his regular work. It is not sufficient that the carrier [220] state to the employees that they are released and free to go wherever they choose, when the employee at the same time is given to understand that he shall keep himself in readiness to respond whenever called for or needed to resume regular duty.

Said plaintiff then and there, while the jury was in the box, duly excepted to the Court's refusal to give the foregoing instruction.

10.

As to counts seven to twelve, inclusive, you are instructed that the heavy rains and unprecedented floods occurring on the dates shown did not excuse the carrier for keeping the employees involved on duty in excess of sixteen hours.

Said plaintiff then and there, while the jury was in the box, duly excepted to the Court's refusal to give the foregoing instruction.

11.

You are instructed that for a casualty, unavoidable accident, or act of God to warrant service of employees engaged in or connected with the movement of trains in excess of sixteen hours, such cause of delay must have arisen subsequent to the time such employees left their initial terminal.

Said plaintiff then and there, while the jury was in the box, duly excepted to the Court's refusal to give the foregoing instruction. [221]

12.

You are instructed that the bad condition of the defendant's railroad track, bridges and roadbed on February 27, 1914, due to the heavy rains and unprecedented floods arising on February 18, 19, 20, 21, and 22, does not justify the defendant in keeping on duty in excess of the sixteen hour period a crew who left their initial terminal at Los Angeles on said day of February 27, 1914.

Said plaintiff then and there, while the jury was in

the box, duly excepted to the Court's refusal to give the foregoing instruction.

13.

You are instructed that if you find the defendant guilty of the counts involved, you have nothing whatever to do with the fixing of the amount of the penalty for the violation; that the matter of assessing the penalties is entirely for the consideration of the Court, and your duty only is to find whether or not the employees made the basis of the various thirty counts of the plaintiff's petition, were or were not on duty in excess of sixteen hours.

Said plaintiff then and there, while the jury was in the box, duly excepted to the Court's refusal to give the foregoing instruction. [222].

Thereupon the jury returned a verdict in favor of the defendant in words and figures as follows:

*In the District Court of the United States in and for
the Southern District of California Southern
Division.*

No. 345—CIVIL.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Cor-
poration,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find in favor of the defendant, Southern Pacific Company, a corporation.

Los Angeles, Cal., Oct. 27, 1915.

GEO. F. GUY,
Foreman. [223].

Order Settling and Allowing Bill of Exceptions.

IT IS HEREBY STIPULATED that the foregoing may constitute a bill of exceptions of the above-entitled cause and that the same may be settled by the judge who tried the same.

Dated this 8 day of April, 1916.

ALBERT SCHOONOVER,
United States Attorney,
ROBERT O'CONNOR,
Assistant U. S. Attorney,
Attorneys for Plaintiff.
HENRY T. GAGE and
W. I. GILBERT,
Attorneys for Defendant.

The foregoing bill of exceptions, containing all of the evidence offered and introduced at the trial of said cause, necessary to a review of the said cause on this appeal, and the instructions of the Court to the jury, with the plaintiff's exceptions thereto, and containing all of the proceedings at the trial of the said cause, is a true and correct bill of exceptions, and the time for filing plaintiff's proposed bill of exceptions and defendant's amendments thereto and for settling of said bill of exceptions having been duly extended by order of this court, the said bill of exceptions is hereby settled and allowed and ordered to be filed.

Dated this 8th day of April, 1916.

OSCAR A. TRIPPET,
District Judge. [224]

[Endorsed]: No. 345—CIVIL. In the District Court of the United States for the Sou. Dist. of California, Southern Division. The United States of America vs. The Southern Pacific Company. Bill of Exceptions. Filed Apr. 8, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [225]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 345—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
et al.,

Defendants.

Petition for Writ of Error.

The United States of America, plaintiff in the above-entitled cause, feeling itself aggrieved by the verdict of the jury, and judgment of the Court, entered on the 30th day of October, 1915, comes now by Albert Schoonover, United States Attorney, and Robert O'Connor, Assistant United States Attorney, its attorneys, and files herewith an assignment of errors and petitions said Court for an order allowing said plaintiff to procure a writ of error to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of

the United States in that behalf made and provided; and that upon the filing of the said writ of error in the clerk's office of the United States District Court for the Southern District of California, Southern Division, at Los Angeles, California, all further proceedings in this Court be suspended and stayed until the termination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

[226]

And your petitioner will ever pray.

Dated March 7, 1916.

ALBERT SCHOONOVER,

United States Attorney,

ROBERT O'CONNOR,

Assistant United States Attorney.

Attorneys for Plaintiff.

[Endorsed]: No. 345—Civil. In the District Court of the United States for the Sou. Dist. of California Southern Division. United States of America vs. Southern Pacific Company. Petition for Writ of Error. Filed Mch. 7, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [227]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 345—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Assignments of Error.

Comes now the United States of America, plaintiff in the above-entitled cause, and files the following assignments of error upon which it will rely in its prosecution of a writ of error in the above-entitled cause, petition for which said writ of error to review the judgment of this Honorable Court, made and entered in said cause on the 29th day of October, 1915, it files at the same time with this assignment.

Assignment No. 1.

That said United States District Court for the Southern District of California, Southern Division, erred in overruling plaintiff's demurrer to defendant's amended answer.

Assignment No. 2.

That said United States District Court for the Southern District of California, Southern Division, erred in overruling plaintiff's demurrer to defendants first amended answer. [228]

Assignment No. 3.

That said United States District Court for the

Southern District of California, Southern Division, erred in overruling plaintiff's demurrer to defendant's second amended answer.

Assignment No. 4.

That the verdict of the jury is not sustained by sufficient evidence.

Assignment No. 5.

That the verdict of the jury is contrary to the evidence.

Assignment No. 6.

That the verdict of the jury is contrary to the law.

Assignment No. 7.

That the court erred in refusing to give plaintiff's requested instruction No. 1, to wit:

"You are requested to find for the plaintiff on each of the first six counts of the plaintiff's declaration."

Assignment No. 8.

That the court erred in refusing to give plaintiff's requested instruction No. 2, to wit:

"You are requested to find for the plaintiff on each of the counts seven to twelve, inclusive, of the plaintiff's declaration." [229]

Assignment No. 9.

That the Court erred in refusing to give plaintiff's requested instruction No. 3, to wit:

"You are requested to find for the plaintiff on each of the counts thirteen to eighteen, inclusive, of the plaintiff's declaration."

Assignment No. 10.

That the Court erred in refusing to give plaintiff's requested instruction No. 4, to wit:

"You are requested to find for the plaintiff on each

of the counts nineteen to twenty-four, inclusive, of the plaintiff's declaration."

Assignment No. 11.

That the Court erred in refusing to give plaintiff's requested instruction No. 5, to wit:

"You are requested to find for the plaintiff on each of the counts twenty-five to thirty, inclusive, of the plaintiff's declaration."

Assignment No. 12.

That the Court erred in refusing to give plaintiff's requested instruction No. 6, to wit:

"If you believe that the so-called releases at Colton, varying from one hour to one hour and thirty minutes were not in the nature of releases for a definite and fixed time, you are instructed that such releases did not break the continuity [230] of the service of the employees involved. A release for an indefinite period, although it transpired that such period of inactivity amounted to as much as one hour and thirty minutes, did not break the continuity of service within the meaning of the statutes."

Assignment No. 13.

That the Court erred in refusing to give plaintiff's requested instruction No. 7, to wit:

"If you believe that when the crews involved reached Colton they had not reached their terminal or the end of their run, and that they still remained the crews of their respective trains, and that the so-called releases at said point were not for a definite and fixed period, you are instructed that such releases did not effect a break in the continuity of their service."

Assignment No. 14.

That the Court erred in refusing to give plaintiff's requested instruction No. 8, to wit:

"For a release to constitute a break in the service, it must be given before the period claimed begins, and must be for a definite time."

Assignment No. 15.

That the Court erred in refusing to give plaintiff's requested instruction No. 9, to wit: [231]

"A release to break the continuity of service must be such that all the facts and surrounding circumstances will permit of the employees being absolutely free to come and go at will, and not so restricted that the complete enjoyment of such release may be hampered by the fear that such employee may be wanted by his employer at some particular place during such time of release for duty in connection with his regular work. It is not sufficient that the carrier state to the employees that they are released and free to go wherever they choose, when the employee at the same time is given to understand that he shall keep himself in readiness to respond whenever called for or needed to resume regular duty."

Assignment No. 16.

That the Court erred in refusing to give plaintiff's requested instruction No. 10, to wit:

"As to counts seven to twelve, inclusive, you are instructed that the heavy rains and unprecedented floods occurring on the dates shown did not excuse the carrier for keeping the employees involved on duty in excess of sixteen hours."

Assignment No. 17.

That the Court erred in refusing to give plaintiff's requested instruction No. 11, to wit:

"You are instructed that for a casualty, unavoidable accident, or act of God to warrant service of employees [232] engaged in or connected with the movement of trains in excess of sixteen hours, such cause of delay must have arisen subsequent to the time such employees left their initial terminal."

Assignment No. 18.

That the Court erred in refusing to give plaintiff's requested instruction No. 12, to wit:

"You are requested that the bad condition of the defendant's railroad track, bridges and road-bed on February 27, 1914, due to the heavy rains and unprecedented floods arising on February 18, 19, 20, 21 and 22, does not justify the defendant in keeping on duty in excess of the sixteen-hour period a crew who left their initial terminal at Los Angeles on said day of February 27, 1914."

And upon the foregoing assignments of error and the record in the said cause, the plaintiff prays that said judgment may be reversed.

ALBERT SCHOONOVER,

United States Attorney.

ROBERT O'CONNOR,

Assistant U. S. Attorney.

[Endorsed]: No. 345—Civil. In the District Court of the United States for the Sou. Dist. of California, Southern Division. United States of America vs. Southern Pacific Company. Assignments of Error.

Filed Mch. 7, 1916. Wm. M. Van Dyke, Clerk. By
Leslie S. Colyer, Deputy. [233]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 345—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, et al.,

Defendants.

Order Allowing Writ of Error.

Upon motion of Albert Schoonover, United States Attorney, and Robert O'Connor, Assistant United States Attorney, attorneys for plaintiff, and upon filing a petition for writ of error, and an assignment of errors,

IT IS ORDERED that a writ of error be, and it is hereby allowed to have reviewed in the United States Circuit Court for the Ninth Circuit the verdict and judgment heretofore entered herein.

Dated March 7, 1916.

OSCAR A. TRIPPET,

Judge.

Service of the above order is hereby admitted, and a copy thereof received, this 7th day of March, 1916.

HENRY T. GAGE and

W. I. GILBERT,

Attorneys for Defendants. [234]

[Endorsed]: No. 345—Civil. In the District Court of the United States for the Sou. Dist. of California, Southern Division. United States of America vs. Southern Pacific Company. Order allowing writ of error. Filed March 7, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [235]

In the District Court of the United States of America, Southern District of California, Southern Division.

No. 345—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Praecipe for Transcript.

To the Clerk of the Above Court:

Sir: Please issue a certified copy of the record in the above-entitled cause, consisting of the papers following:

1. Complaint.
2. Answer.
3. Demurrer.
4. First Amended Answer.
5. Demurrer to First Amended Answer.
6. Second Amended Answer.
7. Demurrer to Second Amended Answer.
8. Verdict.
9. Judgment.

10. Instructions given.
11. Plaintiff's Requested Instructions.
12. Motion for new trial.
13. Bill of Exceptions.
14. Petition for Writ of Error.
15. Assignments of error. [236]
16. Writ of Error.
17. Order allowing Writ of Error.
18. Citation in Error.

Said record to be certified under the hand of the clerk and the seal of the above court.

ALBERT SCHOONOVER,
United States Attorney.
ROBERT O'CONNOR,
Assistant U. S. Attorney.

[Endorsed]: No. 345—Civil. In the District Court of the United States for the Sou. Dist. of California, Southern Division. United States of America, vs. Southern Pacific Company. Praecipe for Transcript. Filed Mch. 7, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [237]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 345—CIVIL.

THE UNITED STATES OF AMERICA,
Plaintiffs,
vs.
SOUTHERN PACIFIC COMPANY,
Defendant.

Certificate of Clerk U. S. District Court.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing two hundred and thirty-seven (237) typewritten pages, numbered from 1 to 237, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Complaint, Answer First Amended Answer, Demurrer to First Amended Answer, Second Amended Answer, Demurrer to Second Amended Answer, Verdict, Judgment, Instructions Given by the Court, Instructions Requested by Defendant, Motion for New Trial, Bill of Exceptions, Petition for Writ of Error, Assignments of Error, Order Allowing Writ of Error, and Praecipe for Transcript of Record on Writ of Error in the above and therein-entitled action, and that the same together constitute the record in return to the annexed Writ of Error as specified in the said Praecipe for Transcript filed in my office on behalf of The United States of America, the Plaintiffs in Error herein, by their attorneys of record.

IN TESTIMONY WHEREOF, I have hereunto set my hand, and affixed the seal of said District Court for the Southern District of California, Southern Division, this 21st day of April, in the year of our Lord one thousand nine hundred and sixteen,

and of our Independence the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of
America, in and for the Southern District of
California,

By Leslie S. Colyer,
Deputy Clerk. [238]

[Endorsed]: No. 2790. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. The Southern Pacific Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed May 3, 1916.

F. D. MONCKTON.

Clerk of the United States, Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*United States Circuit Court of Appeals, for the
Ninth Circuit.*

No. 345—CIV.

UNITED STATES OF AMERICA,

Plaintiffs in Error,

vs.

THE SOUTHERN PACIFIC COMPANY,

Defendant in Error.

**Order Extending Time to and Including July 1,
1916, to File Record and Docket Cause.**

Good cause appearing therefor, it is hereby ordered that the time within which the plaintiffs in error in the above-entitled action may file record and docket cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is extended to and including the 1st day of July, 1916.

Los Angeles, 3/28, 1916.

TRIPPET,

District Judge.

[Endorsed]: No. 2790. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiffs in Error, vs. The Southern Pacific Company, Defendant in Error. Order Extending Time to Docket Cause and File Record. Filed Apr. 3, 1916. F. D. Monckton, Clerk. Refiled May 3, 1916. F. D. Monckton, Clerk.

No. 2790.

**United States Circuit Court of Appeals,
Ninth Circuit.**

THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR,

v.

THE SOUTHERN PACIFIC COMPANY, DEFENDANT IN
ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT
COURT OF THE SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

ALBERT SCHOONOVER,
United States Attorney.

PHILIP J. DOHERTY,
Special Assistant United States Attorney.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1917

Filed

MAR 9 - 1917

F. D. Monckton,
Clerk.

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United States Circuit Court of Appeals, Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error, <i>v.</i> THE SOUTHERN PACIFIC COMPANY, A CORPORATION, defendant in error.	}	No 2790.
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*IN ERROR TO THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN
DIVISION,*

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This suit was instituted by the United States against the Southern Pacific Co. to recover penalties for violations of the act of Congress commonly known as the Federal hours-of-service law (34 Stat. L., 1415). The complaint consisted of 30 counts involving the service of five train crews each of which consisted of six employees.

Counts 1 to 6, inclusive, relate to the service of the train crew of extra 2784 from Los Angeles to Indio, in the State of California, on February 2, 1914, the service being from 5 a. m. to 9.50 p. m. on said date.

Counts 7 to 12, inclusive, relate to the service of the train crew of extra 2765 from Indio to Los Angeles, in the State of California, on February 27, 1914, the service being from 3.10 a. m. to 8.40 p. m. on said date.

Counts 13 to 18, inclusive, relate to the service of the train crew of No. 242, eng. 2549, from Los Angeles to Palm Springs, in the State of California, on February 24, 1914, the service being from 1.30 a. m. to 6.50 p. m. on said date.

Counts 19 to 24, inclusive, relate to the service of the train crew of 1/242, eng. 2617, from Los Angeles to Indio, in the State of California, on March 8, 1914, the service being from 1.55 a. m. to 7 p. m. on said date.

Counts 25 to 30, inclusive, relate to the service of the train crew of No. 516, eng. 2711, from Los Angeles to Indio, in the State of California, on March 12, 1914, the service being from 7.30 p. m. on said date to 12.25 p. m. on March 13, 1914.

The defendant's answer and special amended answer raises these defenses:

Employees in question were not on duty in excess of 16 hours, because in each case there was a release from duty at Colton sufficient to bring the service within a total of 16 hours.

As to counts 7 to 12, inclusive, there was a special answer not alleging any delay to the particular train of which the employees specified in these counts were the crew, but alleging "that any delay which occurred in the operation of the trains mentioned * * *

could not have been foreseen or guarded against by the defendant company because of the fact that it could not be ascertained at any given point on said track the length of time which would be consumed in reaching another given point." (Rec., p. 122.)

To the defendant's second amended answer the Government filed a demurrer. (Rec., p. 121.) The record does not show any action taken by the court on this demurrer. Colloquy relating thereto. (Rec., p. 186.) Assignment No. 3 of the assignments of error recites that the court erred in *overruling* plaintiff's demurrer to defendant's second amended answer. (Rec., p. 214.)

The case was heard by the court and jury on stipulation (Rec., p. 143) and evidence (Rec., pp. 147 to 197, inc.).

The plaintiff requested 13 special instructions (Rec., pp. 205 to 209), to the refusal of each of which exception was duly taken.

Verdict was for the defendant.

STIPULATION AND EVIDENCE.

The following stipulation of facts was entered into and agreed upon:

It is hereby stipulated and agreed between the parties in the above-entitled cause that the defendant is and was at the times involved in the Government's declaration a corporation organized and doing business under the laws of the State of Kentucky, and a common carrier engaged in interstate commerce by railroad in the State of California.

That the trains involved in the 30 counts of the Government's declaration were, on the dates alleged, engaged in the movement of interstate commerce.

As to counts 1 to 6, inclusive, it is stipulated that the employees, made the basis of said counts, and whose names are set forth therein, went on duty in the service of the defendant company at 5 a. m. on February 2, 1914, in charge of said defendant's train, Extra 2784, and that said employees in charge of said train proceeded with said train from Los Angeles, Cal., to Indio, in said State, at which latter point said employees were by the defendant released at the hour of 9.50 p. m. of said date; that said employees at the station of Colton, Cal., were by the defendant given what was at that time designated by the defendant a release of 1 hour and 30 minutes; that with the exception of said 1 hour and 30 minutes said employees were on duty continuously on said date from the hour of 5 a. m., to the hour of 9.50 p. m.

With respect to counts 7 to 12, inclusive, it is stipulated that the employees, made the basis of said counts, and named in said counts of the Government's declaration, were on the 27th day of February, 1914, by the defendant, placed in charge of defendant's train, Extra 2765, running from Indio, in the State of California, to Los Angeles, in said State, and the said crew, on said date, did operate defendant's train between said points; that the said crew reported for duty at Indio, Cal., at 3.10 a. m. on said date and were finally

relieved from duty by the defendant at 8.40 p. m. on said date at Los Angeles, Cal. At the station of Colton, on said date, the said crew in charge of Extra 2765 were by the defendant given what was designated by said defendant at said time a release of 1 hour and 30 minutes; that with the exception of the time of said designated release the said crew were continuously on duty from said hour of 3 a. m. on said date to the hour of 8.40 p. m. on said date.

As to counts 13 to 18, inclusive, it is stipulated that the employees named therein, and made the basis of said counts, were by the defendant placed in charge of said defendant's freight train No. 242, engine No. 2549, on February 24, 1914; that said train crew in charge of said train were connected with the movement of said train from Los Angeles, in the State of California, to Palm Springs, in said State; that said train crew reported for duty and began service at the hour of 1.30 a. m. on said date at Los Angeles, Cal., and were relieved from duty by the defendant at 6.30 p. m. on said date at Palm Springs, in the State of California; that said defendant on said date gave said crew at Colton, Cal., what was designated at said time by said defendant a release of 1 hour and 20 minutes; that with the exception of the time of said designated release said employees of said defendant in charge of said train were on continuous duty from the hour of 1.30 a. m. on said date to the hour of 6.30 p. m. on said date.

As to counts 19 to 24, inclusive, it is stipulated that the employees named therein, and made the basis of said counts, were by the defendant on the 8th day of March, 1914, placed in charge of defendant's freight train 1/242, engine 2617, and said employees while in charge of said train conducted said train from the station at Los Angeles, Cal., to the station of Indio, in said State; that said employees went on duty on said date in charge of said train at the hour of 1.35 a. m. at Los Angeles, Cal., and were by the defendant relieved at Indio, in said State, at the hour of 7 p. m., on said date; that said crew at the station of Colton, Cal., were by the defendant given what was at that time designated by the defendant a release of 1 hour and 20 minutes; that with the exception of said release of 1 hour and 20 minutes the said crew in charge of said train on March 8, 1914, were in continuous service from the hour of 1.55 a. m. to the hour of 7 p. m. on said date; that with the exception of said period of release at Colton, Cal., on said date, said crew were in continuous service in charge of said train from the hour of 1.55 a. m. to the hour of 7 p. m. on said date.

With respect to counts 25 to 30, inclusive, it is stipulated that the employees named in said counts and made the basis of said counts were by the defendant placed in charge of defendant's freight train 516, engine 2711, on the 12th day of March, 1914, and that said employees on said date, and the following day of March 13, 1914, conducted said train from the station of Los Angeles, Cal., to the station

of Indio, in said State; that at the hour of 4.20 p. m. on the 13th day of March aforesaid, when said crew were at Colton, in the State of California, they were by the defendant given what was designated by said defendant on said date a release of one hour; that with the exception of said period of release said employees were in continuous service on said date from the hour of 7.30 p. m. on March 12, 1914, to the hour of 12.25 p. m. on March 13, 1914.

It is further stipulated that the parties to the above-entitled cause reserve the right to introduce any further testimony relative to what occurred on said dates at Colton, Cal., with respect to all the facts and circumstances surrounding the aforesaid designated releases of said crews on said dates.

It is further stipulated between the parties hereto and to be considered as applying to each and every count in plaintiff's petition that during the aforesaid periods of release at Colton said train crews were not in any way called upon and did not perform any duties in connection with their service in the movement of their said train.

The carrier's trains through Colton were stopped at Colton and the train and engine crews relieved for the length of time covered by the necessary detention at Colton. The record does not show in all instances the real cause of the detention of trains at Colton, but there is mention made of the fact that refrigerator cars are held there for "icing" and that there is switching and making up and breaking up of trains done there. None of this local work is done,

however, by the train or engine crews bringing trains into Colton.

No other distinction is made between the work done at Colton than at other way stations where cars are taken out of and put into trains. That there is quite extensive work there in switching out of and into trains at this place may be inferred from the facts recited in the record.

To cover the time of detention at this place, the superior officers who testified point out that the practice is to release crews "until called." Whenever a crew is needed to resume its journey a call boy is sent out to recall them.

As to these releases the testimony is as follows:

The yardmaster at Colton gave us our release.

Either the yardmaster or the operator on duty.

When the yardmaster gave us our release he usually says: "You are released for two hours," or more, whichever it might be, whichever was the case.

It is a verbal release.

I do not remember the form of the expression used on this particular day.

It is very seldom the practice to give a release for any indefinite period, although they would do so at times, and in case of an indefinite release the form of release would be, "You are released for a call." I do not think this was the form of release on this particular day, but I am not certain.

As near as I can remember on this particular day, after I got my release I went over on Front Street and got lunch, after which I came back to the yard and went to the caboose. (Rec., p. 159.)

We were at all times supposed to be within calling distance, and for that reason during these releases I would stay within calling limits, which, I believe, is 1 mile. (Rec., p. 160.)

I do not remember what our crew did on that day at Colton, but if we were released for an hour or an hour and a half or two hours, we certainly didn't do a thing in regard to the work for the time that we were released for. (Rec., p. 162.)

The yardmaster or operator on duty at the time gave me that order, and, as near as I can remember, all he said was, "You are released for one hour," or "two hours" as the case might be. (Rec., p. 163.)

On our arrival at Colton we go in and register in the train register and also turn the waybills of the cars in the train over to the trainmaster, and he personally notified me that I would be released until called. When I arrived at Colton—there is always more or less delay there, that is the eating station—and on arrival there I, as well as most of the men, go in and say, "Well, what is the dope? How long do you think we will be here?" That, so that we will know how much time we will have to eat. If he sees there is quite a bit of delay, he says, "You are released until called to finish the trip." I was released there

this day for an hour and 30 minutes. When I was recalled, I was called to finish the trip to Indio, eastbound. (Rec., pp. 166, 167.)

I was relieved for an hour and 30 minutes at Colton, but I don't remember the terms of that release. It meant that we were to be released, the watchman would take charge of the engine and we were to get off and stay away from the engine until the time was up, unless they called me. It released me from continuing the journey on 242 unless they notified me to come on. (Rec., p. 170.)

I say I don't know whether I was released for a definite period or not. If I was, I would be back at the roundhouse, but I don't remember the exact time. I wouldn't be positive whether I was released for a definite period on February 24, 1915, (?) with respect to train 242, engine 2549, unless I could see some reports. It might have been a release until I was called, or a release for a definite time. (Rec., p. 173.)

These employees were released for a period of 1 hour and 30 minutes at Colton on that day. (February 2, 1914.) The purpose of that release was to give them a rest. We did not need them there while we were doing the work. If we had not released them, the hours of service would have continued. If they had not been released under the form that they were released, they probably would not have reached their destination within the 16 hours. When the release was given it was not given with the anticipation, necessarily, that the crew might not reach their destination within

16 hours. We did not need them and so we gave them their freedom. That is true with regard to all these crews on these trains. *All of these employees were paid for the time that they were released at Colton.* (Rec., pp. 173-174.)

That crew on that day (March 12, 1914) proceeded to Indio and were released at Colton for an hour and thirty minutes. That meant that they were absolutely released from responsibility. I did not hear any of them testify here to-day that they were released for a definite time. When they are released they can do anything they see fit. When released they would probably say, "You will find me at such and such a place. I will be down at the bunk house or at the hotel or getting lunch." At the expiration of 1 hour and 30 minutes they are told, "You are released." They will say, "All right; I am going down and get some sleep," or "All right; I am going over to the lunch counter, and you will find me there when you want me." *When these men were released they did not know when they would be called again.* They might not be called for two hours or they might be called within an hour. The form is, "You are released." That means that he is released from responsibility *until called*. It may be a release for 30 minutes--any length of time. We have released them for a period as short as 20 minutes. When a man is released, when he is notified he is released, he doesn't know anything more than that he is released. As far as I know, that is true in regard to all these men involved in

this case, and I am justified in saying that from my own knowledge in the usage in the transportation business. When these men were released for an hour and thirty minutes in these particular cases, that meant that they were released, that they were as free men as there is in the world, until the call boy gets them again. (Rec., pp. 175-176.)

If these men had gone and taken an automobile ride we would call somebody else if we could not find them. If these men had gone and taken an automobile ride and notified the man in charge that they would be found 25 miles out within an hour, we would not be able to get these men back at any minute if we wanted them in 10 minutes, and if they were not there and they were not able to get them within the time needed we would call somebody else. If nobody else was available, there would be a delay. Of course those are impossible conditions. Yet the men have a right to go but they would not lose their jobs. They would not be subject to suspension. We would take them to task about it. It would be a careless way to do, to go out in the country without saying where they would be. They should say, "I will be at such and such a place at such a time." If they were 50 miles away at such a time it would not be satisfactory to the railroad company. *They should be where they could be called when wanted.* This release is a matter of common sense. They are told "Now you are released," and they say, "We will be found at such a place." The man wants to work, you know, he wants to do more work and the

railroad company wants him, too, and the railroad company *wants him* to be where he is *accessible when needed* and wants him to tell them he will be there. (Rec., 178.)

Q. What was the system of release at Colton followed by the Southern Pacific Co. during February and March of last year (1914)?

A. (Mr. Sloan, assistant superintendent). They were released from duty on their arrival *until they were called* to leave.

Q. Until they were called?

A. Yes; "Released until called" meant that they understood they were off duty. That they are not in any way employed. They are absolutely free. And they would be *called when they would be needed*, just the same as for their initial trip. *The release was for an indefinite period.* With regard to the crew running from Los Angeles to Indio, when that crew got to Indio it was released. With regard to the crew running from Indio to Los Angeles, when they arrived at Los Angeles they were released. They are at their terminal. They are through. The crews would *not* be paid for their release *at Indio*, because that is their *terminal* and would *not* be paid for their release at *Los Angeles* because that is their *home terminal*, but *they are paid for their release at Colton.* *They are paid for every minute they are at Colton.* *That is between their terminals.* *That is because they had not reached their destination.* *The release at Colton differed from the releases at their terminals in this: At*

Colton they are at the middle of their run. At their terminals they are at home. They go home just like you go home when you get through your work, when at Colton they are only released from duty. (Rec., pp. 181-182.)

It was very often the case at that time that the time used from Los Angeles to Indio or Indio to Los Angeles was very near the 16-hour period. If the time allowed at Colton should not be counted, the time of duty of these crews in a number of cases would have been in excess of 16 hours. It was an order that the crews be released. That was the system. We always released those crews at Colton. (Rec., p. 185.)

Regarding counts 7 to 12, inclusive, the following testimony was had over the objection of the plaintiff:

The train left Indio for Los Angeles on February 27, at 3.10 a. m., and was tied up at Los Angeles at 8.40 p. m. of that day. I do not know of anything that occurred subsequent to the departure of that train from Indio that affected its movement, except track conditions, and the condition of the track was known at the time the crew left the terminal, in a general way, but the condition of the track was not such that we could tell the exact running time. (Rec., p. 193.)

The heaviest rains fell at Los Angeles, for instance, according to the Weather Bureau records, February, 1914. There were 4.26 inches fell on the 18th of February; 0.94 inch on the 19th; 1.69 on the 20th; 0.15 on the 21st; none on the 22d; none on the 23d; and none for the balance of the month. (Rec., p. 195.)

The flow of the river on the 17th of February, the day prior to the rain, was 282 cubic feet per second; on the 18th it was 1,750—that is the day of the big rain; on the 19th, 4,540; on the 20th, 11,800; on the 21st, 8,480; on the 22d, 6,620; on the 23d, 4,710; on the 24th, 4,180; on the 25th, 2,950; on the 26th, 2,840; on the 27th, 2,500; on the 28th, 2,200. That is, cubic feet per second. A cubic foot per second is 50 miner's inches. That was a very unusual flow for that stream. (Rec., p. 197.)

The flow was heaviest on the 20th, and it gradually reduced down until the 28th. On the 27th it was 2,500 cubic feet per second. The condition of the stream was much better on the 27th than on the 20th. (Rec., p. 197.)

Statute (34 Stat. L., 1415):

An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the

United States. The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than 16 consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for 16 hours he shall be relieved and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty; and no such employee who has been on duty 16 hours in the aggregate in any 24-hour period shall be required or permitted to continue or again go on duty without having had at least 8 consecutive hours off duty: *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than 9 hours in any 24-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than 13 hours in all towers,

offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a 24-hour period on not exceeding 3 days in any week: *Provided further*, The Interstate Commerce Commission may, after full hearing in a particular case and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided*, That the provisions of

this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this Act shall not apply to the crews of wrecking or relief trains.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act.

SEC. 5. That this act shall take effect and be in force one year after its passage.

Approved, March 4, 1907, 11.50 a. m.

QUESTIONS INVOLVED.

1. IN SUSTAINING THE BURDEN OF PROOF OF THE CARRIER WHERE SERVICE OF A TRAIN CREW IN EXCESS OF 16 HOURS IN A 24-HOUR PERIOD IS ESTABLISHED AND DEFENDANT RELIES ON THE CASUALTY PROVISIO FOR A DEFENSE, IS IT NECESSARY FOR THE CARRIER TO SHOW A CAUSAL CONNECTION BETWEEN THE CASUALTY, UNAVOIDABLE ACCIDENT, OR ACT OF GOD RELIED ON AND THE DETENTION ON DUTY OF SUCH TRAIN CREW?

2. WHERE THE CASUALTY PROVISIO IS RELIED ON AS A DEFENSE IS IT NECESSARY FOR THE CARRIER TO SHOW THAT COMPLIANCE WITH THE OBLIGATION FIXED BY EXPRESS WORDS OF THE STATUTE TO RELIEVE EMPLOYEES AT THE EXPIRATION OF 16 HOURS'

SERVICE, HAS BEEN PREVENTED BY AN EXCUSABLE CAUSE?

3. MAY THE PERIOD OF 16 HOURS' DUTY OF A TRAIN CREW BETWEEN TERMINALS BE EXTENDED BY A CARRIER BY GIVING TO SUCH CREW SHORT RELEASES NOT EXCEEDING AN HOUR AND A HALF TO COVER THE TIME IT IS FORESEEN THAT SUCH CREW MAY BE DETAINED AT A WAY STATION FROM ANY OF THE USUAL CAUSES OF RAILROAD OPERATION.

4. ARE SUCH RELEASES OPERATIVE TO DIMINISH TIME ON DUTY WHERE THE CREW IS AT ALL TIMES DURING SUCH RELEASE SUBJECT TO IMMEDIATE RECALL IF REQUIRED BY THE CARRIER?

5. ARE SUCH RELEASES BETWEEN TERMINALS TO BE REGARDED AS TIME OFF DUTY WHERE THE EMPLOYEES ARE PAID FOR THE TIME COVERED BY SUCH RELEASE?

6. WHERE CONDITIONS RESULTING FROM A CAUSE COVERED BY THE CASUALTY PROVISIO ARE KNOWN WHEN A TRAIN CREW LEAVES A TERMINAL, MAY EXCESS SERVICE OF SUCH CREW BE JUSTIFIED UNDER THE PROVISIO?

I.

IN SUSTAINING THE BURDEN OF PROOF ON THE CARRIER WHERE SERVICE OF A TRAIN CREW IN EXCESS OF 16 HOURS IN A 24-HOUR PERIOD IS ESTABLISHED AND DEFENDANT RELIES ON THE CASUALTY PROVISIO FOR A DEFENSE, IS IT NECESSARY FOR THE CARRIER TO SHOW A CASUAL CONNECTION BETWEEN THE CASUALTY, UNAVOIDABLE ACCIDENT,

OR ACT OF GOD RELIED ON AND THE DETENTION ON DUTY OF SUCH TRAIN CREW?

The mere happening of a casualty, unavoidable accident, or act of God during a trip does not call into effective operation the casualty proviso as an excuse for excess service of a train crew. The excess service must have been caused by such casualty. It must have been a necessary and unavoidable result thereof. It goes without saying that Congress never intended to excuse service in excess of the standard fixed unless the justification specified in the proviso was the necessary cause of such excess service.

That the excess service must be the "*direct result*" of an excusable cause was held by this court in *San Pedro, Los Angeles & Salt Lake Railroad Co. v. United States* (220 Fed., 737).

In the case at bar the record shows an entire absence of any evidence that the train crew involved in counts 7 to 12, inclusive, as to which the defendant pleaded the existence of flood conditions, that the train on which they were employed was in any manner delayed in the course of its journey by reason of the flood conditions as to the existence of which there was allegation and proof. Not only is there an entire absence of any proof that this train was delayed by reason of the flood conditions, but the defendant's answer discloses no allegation that the train in question was so delayed.

Assignment No. 16 in the assignment of errors (Rec., p. 216) is as follows:

That the court erred in refusing to give the plaintiff's requested instruction No. 10, to wit: "As to counts 7 to 12, inclusive, you are instructed that the heavy rains and unprecedented floods occurring on the dates shown did not excuse the carrier for keeping the employees involved on duty in excess of 16 hours."

This question was duly raised and protected by exception before the jury retired. (Rec., p. 208.)

The refusal of the court to give this requested instruction, coupled with the reference by the court in its charge to flood conditions, constitute error gravely prejudicial to the Government's case.

The admission of evidence as to flood conditions was over the objection of the plaintiff.

When counsel objected that weather conditions alone did not establish a defense, but that it would be necessary to show something happening to the particular train after it leaves the terminal, the court suggested an agreement therewith and said that it would have to be shown that something happened after the train left the terminal, but that the carrier could not prove it all at once. (Rec., p. 189.)

But in the subsequent proceedings no evidence is apparent, as shown by the record, that there was anything happened to this train after it left the terminal which was at all attributable to the flood conditions.

And yet the jury was instructed as follows (Rec., pp. 127-128):

On this defense, as I have heretofore stated to you, the defendant assumes the burden of proof to the extent that it must prove by a

preponderance of evidence that the storm was of such violence and unprecedented nature that no ordinary and reasonable amount of care would have prevented the delay. Therefore, if the plaintiff has established by a preponderance of the evidence that the defendant violated the hours of service law, as alleged in the complaint, then the burden of the proof is upon the defendant to prove by a preponderance of evidence that the storm in question was of sufficient violence to have caused the delay alleged in the complaint.

The defendant also claims that the retention of the men in service was the result of the track being soft by reason of the floods, and that it could not be foreseen before the men left the terminal that this delay would occur. On that branch of the answer the defendant must also show by a preponderance of the evidence that such was the fact, and that such soft track was a cause not known to the defendant or its officers or agents in charge of such employees at the time the said employees left the terminal, and it could not have been foreseen.

This portion of the charge taken as a whole would seem to give to the jury the impression that if the defendant proves the flood conditions the jury would be justified in rendering a verdict for the defendant, notwithstanding the fact that there was absolutely no evidence on the part of the defendant that the

train in question was delayed or that the excess service was attributable to the flood conditions.

Furthermore, the reference by the court to the flood conditions was not at all limited or restricted as it should have been to counts from 7 to 12, inclusive, but could have been taken by the jury from its general terms to have applied to all the counts in the plaintiff's petition.

The record also shows that the question of the obligation of the carrier to show the causal connection between the flood conditions and the excess service of the employees in question was specifically raised (Rec., pp. 121-122) by the first paragraph of the demurrer to the defendant's second amended answer.

The Government's demurrer to paragraphs 2 and 3 of the defendant's second amended answer to the seventh, eighth, ninth, tenth, eleventh, and twelfth counts in the plaintiff's cause of action for the reason that the facts and statements therein contained are not sufficient in law to constitute a defense for the following reasons:

1st. That said paragraphs did not allege that the alleged excess service was the result of the unprecedented rainfall and flood that occurred on the dates mentioned in said paragraphs, to wit, the 19th, 20th, 21st, and 22d days of February, 1914.

According to the record the case proceeded to trial without any disposition made of this demurrer.

During the progress of the trial the attention of the court was called to this demurrer (Rec., p. 186) and the court said:

Well, if the demurrer is sustained, I will permit them to amend.

The case thereupon proceeded without further action upon the demurrer, which was neither overruled nor sustained, nor was there any amendment thereafter made which cured the defect as to which this specific demurrer was aimed.

The Government apparently treated the declaration of the court heretofore referred to (Rec., p. 186) as an overruling of its demurrer, and in assignment No. 3 of the assignments of error asserted error in "that the said United States District Court for the Southern District of California, Southern Division, erred in overruling plaintiff's demurrer to defendant's second amended answer." (Rec., p. 214.)

It is respectfully submitted that whether the court rendered final judgment without disposition of the plaintiff's demurrer to defendant's second amended answer, or whether the record is to be interpreted that the District Court overruled plaintiff's demurrer to defendant's second amended answer, in either case the court erred.

a. The court is not authorized to proceed to final disposition of the case upon the facts, where a demurrer applicable to any portion of the pleadings stands undetermined.

b. If the court had in fact overruled plaintiff's demurrer it erred in so doing for the

reason that it is clear that the defendant's answer does not allege that the excess service involved in the 7th to 12th counts, inclusive, was the result of the rainfall and flood. This conclusion seems to be clear from the decision of this court already cited in the case of *San Pedro, Los Angeles & Salt Lake Railroad Company v. United States* (220 Fed., 737).

II.

WHEN THE CASUALTY PROVISIO IS RELIED ON AS A DEFENSE IT IS NECESSARY FOR THE CARRIER TO SHOW THAT COMPLIANCE WITH THE OBLIGATION TO RELIEVE EMPLOYEES FROM DUTY WAS PREVENTED BY THE EXCUSABLE CAUSE RELIED ON.

The duty to relieve employees in train service at the expiration of 16 hours is definitely fixed by the positive terms of the statute itself. Section 2 provides:

Whenever any such employee shall have been continuously on duty for 16 hours he shall be relieved.

The only limitation placed upon this mandatory provision of section 2 is to be found in the proviso in section 3, upon which the carrier in this case relies. This proviso in section 3 reads as follows:

That the provisions of this act shall not apply in any case of casualty or unavoidable accident, or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left

a terminal, and which could not have been foreseen.

Reading together the mandatory provision of section 2 and this proviso, it is evident that "whenever any such employee of such common carrier shall have been continuously on duty for 16 hours he shall be relieved," *unless the failure of the carrier so to relieve him is due to one of the causes specified in the proviso.*

It seems to be the contention of the carrier that whenever a train is delayed somewhere on its journey by an unavoidable accident, or the like, such unavoidable delay, regardless of its duration, thereafter relieves the carrier from the mandatory provisions of section 2. Thus interpreted, any casualty or unavoidable accident to a train during its journey operates as a license to the carrier to prolong the hours of service of the employees thereon far beyond the period prescribed by Congress. The Government contends that such casualty or unavoidable accident is not a license to the carrier to require more than 16 hours continuous service of its trainmen, that it has the effect of relieving the carrier from the penalty only in those instances where such accident has a direct or causal connection with the failure of the carrier to relieve the employees at the end of 16 hours. There must be some causal connection between the casualty or accident relied on and the detention of the men of the train crew on duty. The retention of the employees on duty for more than 16 hours must

be the direct and necessary consequence of the casualty or unavoidable accident relied on.

The fact that a carrier exercised proper care to prevent an accident delaying a train does not relieve it from thereafter exercising a proper degree of care to avoid the consequences of such unavoidable delay. It does not seem as though an excusable delay to a train is a license for an inexcusable delay in relieving the employees thereon after 16 hours' continuous service. This so-called "license" phase of the proviso was rejected by the court in *United States v. The Southern Railway Company*, Western District of North Carolina, decided October 30, 1913. In that case it was the contention of the carrier that it was entitled to operate a train 16 hours and so much longer as it might be delayed by one of the causes named in the proviso, and without relieving the employees thereon. This is the same contention made by the carrier in the case at bar. On this phase of the question Judge Smith said:

On that I rule that the occurrence of an accident or a delay by the act of God or any case of casualty or unavoidable accident while the train is in course of transit from one terminal point to another does not mean that the entire act is suspended as to that train. To hold that the entire act would be suspended as to that train would be to hold that the sixteen hours limit did not apply to any train between terminals during the progress of whose transit between terminals any delay occurred from the exempting causes named

in the statute. The delay might be any number of hours from five to ten, and I hold that the statute does not mean that as to that train the operative period of service is extended from sixteen to twenty-one or twenty-six hours according as some delay from the exempting causes may occur whilst the train is in transit. I construe the statute to mean that the hours of service shall be extended in such cases only so far as may be necessary to permit the train to be operated to a point at which, due regard being had to all the circumstances of the particular case and the character of the train, the train crew could be relieved or be allowed to take the rest required by the statute.

Another case involving the same question is that of *United States v. Oregon-Washington R. & N. Co.* (No. 5943), District of Oregon, decided June 4, 1914. The answer of the defendant alleged that the train in question was delayed by certain causes coming within the proviso, "and that by reason of certain delays and not otherwise the defendant required said employees to remain on duty one hour and fifteen minutes in excess of sixteen hours, and but for said delays said employees would not have remained on duty any amount of time in excess of sixteen hours, and would have completed the trip from La Grande to Umatilla in much less than sixteen hours continuous run." To this answer the defendant demurred, and assigned among other grounds the following:

It does not appear from said answer that defendant made any effort whatsoever to relieve the employee named in any of said causes of action before he had been continuously on duty more than 16 hours.

In sustaining the Government's demurrer, District Judge Bean said:

In this case the judgment of the court is that this answer does not state a defense. This service act prohibits the company from permitting its employees to remain in service more than 16 consecutive hours, unless it should be due to casualty, unavoidable accident, or the act of God, or when the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the employee left a terminal, and which could not have been foreseen. So I take it the purpose of this statute is to prohibit a railway company from allowing or permitting its employees to remain in consecutive service more than 16 hours unless the reason for the delay comes within the particular exceptions of the statute, and therefore it seems to me that where a railroad company's train is delayed and the 16 hours expire, it is the duty of the company to relieve its employees if it can do so by side-tracking its train, if there is a station where it can be done, and that it can not use the delay as a part of the time necessary to reach one of its terminals; otherwise it might continue the service for an indefinite length of time, so I take it this answer is not sufficient and the demurrer should be sustained.

In the case of *United States v. Baltimore & Ohio Railroad Company* (No. 1710), Southern District of Ohio, decided December 17, 1913, the same question was raised. In his charge to the jury District Judge Sater said:

The defendant's position, if I comprehend it correctly, is this: That where a delay occurs that is excusable under the law, the train crew may then go forward and complete the journey; go forward until it reaches its destination, although in so doing it may run over the 16-hour period; that the common carrier is not then required to relieve the crew, even if it may do so; that the common carrier has the right to have them complete the journey where a delay has occurred which is excusable, even though the time to complete the journey is in excess of the 16-hour period. Do I state your position correctly?

Mr. DURBAN. Yes, your honor, except that we claim that the statute by its terms says that in that case the act shall not apply.

Mr. KING. And provided that the period of the excusable delay equals the period of the excess or the overtime; that is admitted in this case.

The COURT. That is the position of the defense as their interpretation of the law.

The Government takes a different view. Its view is that even though a delay excusable in law has occurred, after it is over and the train proceeds the carrier is not excused for working the men or permitting them to work beyond the 16-hour period, or further beyond

the 16-hour period than is necessary to relieve them.

This is the Government's position, if I understand it rightly, viz, that men may not be held to their work or permitted to continue it after the 16-hour period a longer time than is necessary to relieve them.

If I understand its position, it is this: Suppose a crew starts on a run that will take 12 hours. It is out 2 hours. A delay occurs which is excusable in law. Suppose it is held there 9 hours; they would have 10 hours more service if they should complete the whole trip. If they remained on duty to the end of the trip they would put in 21 hours of work. Now, if I understand the defendant's position, it is that they would have the right to go forward and complete that trip although it might take them 21 hours. The Government's position is that the law does not mean that. The defendant's position is that the law would not apply to that kind of a case. The Government's position is that it does apply and that it does not intend that the men shall work beyond the 16 hours, if they can be reasonably relieved, and, if they reach a point at which they may be thus relieved, it is then the duty of the carrier to relieve them. We have not had this question decided by the higher courts. I have concluded that the position of the Government is correct, and that what the law means is that where a delay has occurred the crew may go forward operating the train, but that it can not be held in service without violating the law (if the 16-hour period has ex-

pired) if a suitable stopping place should be reached at which it may be relieved; and that if such a place is reached and the crew is not relieved, that then there is a violation of the law and the carrier becomes responsible; that it is a carrier's duty to provide in such emergencies at suitable places for persons to relieve men who have served the full statutory period or more on account of some delay which may have arisen.

Compliance with the obligation fixed by the words of section 2 to the effect that "whenever any such employee of such common carrier shall have been continuously on duty for 16 hours he shall be relieved," etc., is absolutely and mandatorily required unless excused by either of the provisos in section 3.

The obligation of the carrier to relieve has been considered by this court in three cases: *Great Northern v. United States* (211 Fed., 309, certiorari denied, 34 Sup. Ct. Rep., 776); *Northern Pacific Railway v. United States* (213 Fed., 577); *San Pedro, Los Angeles & Salt Lake Railroad v. United States* (220 Fed., 737).

Compliance with this duty to relieve seems also to be sustained by the decisions of the Eighth Circuit Court of Appeals in *San Pedro, Los Angeles & Salt Lake Railroad v. United States* (213 Fed., 326), and *Great Northern Railway Company v. United States* (218 Fed., 302).

Other cases establishing this duty to relieve are *United States v. Atchison, Topeka & Santa Fe* (236 Fed., 154); *Denver & Rio Grande Railroad Company v. United States* (233 Fed., 62).

In *Denver & Rio Grande Railroad Company v. United States*, 233 Fed. 62, 8th C. C. A., Amidon, District Judge, delivering the opinion of the court said:

A carrier must use diligence to anticipate, as this court held in *United States v. Kansas City Southern Railway Company* (202 Fed. Rep. 828), “all the usual causes incidental to operation.” And *when any casualty occurs the carrier must still use diligence to avoid keeping its employees on duty overtime*. Failure to perform either of those duties deprives it of the benefit of the proviso. [Our italics.]

And again in the same case:

We do not think it was the intent of Congress in case of such serious matters as derailments and collisions to take from the company the protection of the proviso even if such events were caused by the negligence of the company or its employees. On the other hand, it was the intent of the statute in case of such an event to leave the company free to deal with the situation and to retain employees in the service *if that result could not be avoided by the exercise of reasonable diligence after the occurrence of the accident*. [Our italics.]

In the case of *Great Northern Railway Company v. United States*, 218 Fed., 302, 8th C. C. A., the court said:

In other words, the proviso in section 3 of the act *does not relieve* the officials in charge of train crews *from exercising proper diligence*

to avoid working them overtime, and proper diligence requires train officials to know whether or not engines and cars are in proper condition for use when starting them upon a run.
[Our italics.]

In the case of Northern Pacific Railway Company v. United States, 213 Fed., 577, 9th C. C. A., a case where the defense set up was that firemen were held on duty more than 16 hours, the rest of the train crew being released from duty in a case where the train was tied up at a way station by reason of a storm and snowfall of such unusual and unprecedented violence that when it arrived at the station of Avon the telegraph and telephone lines of the company were down in both directions, destroying all means of communication with the operators and dispatchers of the company along the portion of its line here in question; that in consequence of the impossibility of proceeding with the train in such circumstances that train was left at Avon, the crew released from duty, and the fireman placed to watch and guard the engine on a side track. In that case the court said:

That the present case does not come within either of the provisions of the act declaring that it 'shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen'—is obvious, if for no other reason, because the uncontradicted evidence,

as well as the answer of the defendant company itself, shows that each of the trains in question was stopped by direction of the railroad company, side-tracked, and their respective crews laid off for rest within 16 hours from the time they left Missoula for the very purpose of complying with the said statute, excepting only the two named firemen, who were continued at a duty which the company claims was not within the inhibition of the law; *the mistake made was its own mistake in continuing one of each of the crews—the fireman—at the duty of watching the engines.* [Our italics.]

In the case of San Pedro, Los Angeles & Salt Lake Railroad Company *v.* United States, 220 Fed. 737, 9th C. C. A., Ross, Circuit Judge, delivering the opinion of the court, said:

To hold that the act under consideration is made inapplicable by any and every delay that is the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the latter leaves a terminal, and which could not have been foreseen, would be nothing short of making it a dead letter. Manifestly the whole act must be taken together and be so construed as to give effect to its humane purpose and at the same time to give the railroad companies the benefit of the exceptions and provisos in all cases fairly brought within their terms and true intent. There can be no doubt that the paramount purpose of the act was to prevent the overworking of the employees, to the end that their efficiency be not impaired, and that the

obligation was thereby imposed upon the carriers to comply with that requirement, unless prevented therefrom because of a valid excuse, secured to them by the provisos and exceptions contained in the act, which was not made effective within the usual time, but its going into effect postponed for one year, the purpose being, as said by the Supreme Court in the case of *Northern Pacific Ry. Co. v. Washington*, 222 U. S. 370, 379, "to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act." It would seem to follow necessarily that in order for the carrier to justify the excess of service beyond the fixed period prescribed by the act it must show that the same was not in any respect occasioned by the lack of that high degree of care and foresight properly required of the carrier, but was the direct result of an act of God, a casualty, unavoidable accident, or of delay that was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the latter left a terminal and which could not have been foreseen.

In the very recent case of *Great Northern Ry. Co. v. United States*, decided October 28, 1914, by the Circuit Court of Appeals of the Eighth Circuit, that court expressly held, among other things, that the proviso in section 3 of the act under consideration—

Does not relieve the officials in charge of train crews from exercising proper diligence to avoid working them overtime, and proper diligence requires train officials to know

whether or not engines and cars are in proper condition for use when starting them upon a run."

As under the evidence there can be no doubt that the landslide was the direct and necessary cause of the detour of the train in question and of its numerous delays, and that therefore the defendant company was entirely justified in continuing in service its train crew up to the time it could, with the exercise of proper diligence have relieved it, it is plain that the action of the court below in directing a verdict for the plaintiff on counts 3, 4, and 5 must have been based on the view that the defendant company had the opportunity to relieve that crew either at San Bernardino or Daggett, or both, and was by the statute, properly construed, required to avail itself of it; in which view we think, for the reasons already stated, the court was right, being unable to agree with the learned counsel for the defendant company that by the adoption of the first proviso to the third section of the act—

"It was the intention of Congress to permit a crew starting from a terminal to remain with the train overtaken by delay, casualty, or unavoidable accident until the end of the run."

In the case of *Atchison, Topeka & Santa Fe Railroad Company v. United States*, 220 Fed., 748, the court said:

It appears from the stipulated facts filed in the court below that the employees of the

plaintiff in error were employed as conductor and brakemen, respectively, on one of the trains of the plaintiff in error running between Parker, Ariz., and Los Angeles, Cal.; that the employees went on duty at Parker, Ariz., at 10.40 p. m. on October 2, 1912; that the train on which they were employed left Parker at 11.10 p. m. of that date and arrived at Barstow, Cal., at 7.10 a. m. on October 3, 1912, having been delayed between the two points for a period of 2 hours and 30 minutes on account of washouts; that the train left Barstow, Cal., at 7.45 a. m. on October 3, with ample time then remaining to reach Los Angeles within less than 16 hours from the time the employees entered upon their duties, but while the train was being operated between Barstow and San Bernardino an axle broke under the tank of an engine, whereby the movement of the train was unavoidably delayed for a period of 6 hours and 10 minutes, with the result that the train reached San Bernardino at 5.30 p. m. and Los Angeles at 8.25 p. m. on October 3, the employees having then been on duty for 21 hours and 45 minutes; that before the delay of 6 hours and 10 minutes caused by the broken axle had expired, and before the damage which had caused the delay had been repaired, and before the train left the point where such delay occurred, it was known to the plaintiff in error that its employees would have been on duty in excess of 16 hours by the time the train reached San Bernardino; but no effort was made to relieve the employees before they

had been on duty in excess of 16 hours, either previous to or at the time of their arrival at San Bernardino, or at any time before the employees reached Los Angeles; that San Bernardino was a division terminal, but was not a terminal for the employees of the train involved in this proceeding, but the employees of the plaintiff in error could have been relieved at that place and the train placed in charge of another crew.

The position taken by the plaintiff in error is, that the facts above set forth constitute no violation of the statute for the reason that the terminal of its train was Los Angeles and it was entitled to permit its employees to be and remain on duty until that terminal was reached, regardless of whether the 16-hour period prescribed by the statute had expired. The Government's contention is that where delays have occurred the employees may continue to operate the train, but that they can not be held in service beyond the 16-hour period prescribed by the act if a suitable stopping place should be reached at which they may be relieved, and that if such a place is reached and the employees are not relieved, there is a violation of the law.

The position taken by each of the parties in the present action, and the arguments advanced in support of those positions, are in all substantial respects identical with the positions and arguments of the parties in the case of *The San Pedro, Los Angeles & Salt Lake R. R. Co. v. U. S.*, 220 Fed., 757, decided by this court on February 1, 1915. On the authority

of that case the judgment of the court below is affirmed.

In the case of *United States v. Atchison, Topeka & Santa Fe* (236 Fed., 154), District Judge Bean said:

The statute therefore *not only* imposes upon a carrier what might be denominated a *negative obligation*, forbidding it from requiring or permitting an employee to remain on duty, but imposes an *affirmative duty to relieve* such employee after 16 hours of consecutive service, unless it is *prevented* from [doing so by some of the matters specified in the proviso in the statute. Now, the manifest purpose, as I see it, of this statute, was to absolutely prohibit a carrier from requiring or permitting an employee to remain on duty longer than the time specified therein, and to require it to relieve such employee at the expiration of such time unless its delay in doing either of these things comes within the proviso of the statute and was due to one of the causes specified in the exception. In other words, as I understand the statute, the carrier is exempt from liability for excess service when, in case of casualty, unavoidable accident, the act of God, or any other matter specified in the proviso, it necessarily requires or permits an employee to remain on duty beyond the time specified.

Now, therefore, it appears that the train crew has been on duty more than 16 hours consecutively. It is incumbent on the carrier to show by proof that the excess time could not have been prevented by it by the exercise

of that high degree of care in the matter of its equipment, the operation of its road, consistent with the purposes to be accomplished by this act and the practical operation of the road. And, as I understand the statute and construe the decision of the Court of Appeals of the Ninth Circuit, and especially in what is referred to as the *Salt Lake case* (220 Fed., 737), the carrier is required to relieve the crew at the expiration of 16 hours or as soon thereafter as it can do so by the exercise of the degree of care to which I have alluded. I suppose that it could continue the service so far as might be necessary to permit the train to be operated to a point, having due regard to all the circumstances and surrounding facts, where the train crew could be relieved or allowed to take the rest required by the statute; but I do not understand that it may permit or require an employee to continue to the end of his run, although but for some delay due to a matter referred to in the proviso or covered by the proviso in the statute, he would have been able to complete the run within the time specified.

The latest judicial expression upon the question here under consideration is in the case of *United States v. Baltimore & Ohio Railroad Company*, in which Clarke, district judge, now Mr. Justice Clarke, in the District Court of the United States for the Northern District of Ohio, December 2, 1915, charging the jury, said:

My construction of the law is, and I charge you that it is the law of this case, that it was

the duty of the defendant to exercise a very high degree of effort and diligence, having regard to the means of conveyance employed and to the circumstances surrounding the transportation of the train on the night in question to have its cars in good order before train No. 97 started on its journey; and also, if, in the course of its journey, *through casualty or unavoidable accident, or the act of God,* or as the result of a cause not known to the company, or any of its agents in charge of the crew of the train, any delay occurred, that then the company *could not lawfully simply add this delay to the 16 hours* which it might keep its crew on duty, but that when such a delay from such a cause arose *it became the duty* of the defendant railroad company *to exert itself in a highly energetic and diligent manner* to either get its train through to its intended terminal within the 16 hours allowed by law or *to make arrangements to have the men of the crew relieved at the expiration of that time.*

There are several ways in which this might be done. A train too heavy to make the necessary time under the conditions existing could be divided and a part of it left at some available siding. There is no evidence in this case that there was not such a siding available somewhere between Newark and Shelby Junction; or the entire train might be sidetracked until a new crew arrived to take it forward, keeping within the requirements of the law with respect to service.

I am not saying to you that it was possible to do any or all of these things in this particular case, but I do say that it was the legal duty of the defendant company to exert a high degree of energy and diligence to avoid keeping the crew of this train, No. 97, on duty a longer period of time than 16 hours, either in the ways I have suggested, or in some other way which may suggest itself to you. [Our italics.]

While the case of Chicago & North Western Railway Company v. United States, 234 Fed., 268, arose under the "Twenty-eight hour law" the reasoning therein is clearly applicable and is a conclusive answer to the contentions of the carrier made in its brief. In that case it was contended by the carrier that a delay of 2 hours and 52 minutes occurring through a pulled drawbar and consequent derailment of a car, and another delay of 28 minutes through a bursting air hose and resultant pulling out of another drawbar, making three hours and twenty minutes of excusable delay, operated to authorize the prolongation of the transportation without unloading to the extent of the time covered by these delays. In that case the court, at p. 270, said:

The statute prohibits the carrier from confining the stock beyond the period fixed, without unloading into pens, etc., 'unless prevented by storm or other accidents or unavoidable cause which cannot be anticipated or avoided by the exercise of due diligence and foresight.' If the unloading is so prevented, the delay is excused; but if, notwithstanding

unanticipated and unavoidable delays, the carrier ought nevertheless in the exercise of reasonable diligence to have unloaded the stock within the prescribed time, the delay will not relieve it from liability for confinement beyond that time. Delay in transportation may or may not necessarily delay the time of unloading, depending upon the facts of each case. Suppose an instance where, the shipper having consented to 36 hours' confinement, the time reasonably required to convey the stock from origin of shipment to unloading point was 10 hours, and that an excusable delay of 16 hours occurs in transportation, would this excuse the carrier in prolonging the confinement of the stock beyond the 36 hours? Plainly not, if in the exercise of due diligence the confinement, notwithstanding the delay, should not have exceeded 36 hours. In other words, since there were still 20 hours of the 36 in which to do what reasonably required but 10, the overtime of confinement would not be attributable to the delay in transportation. *And surely the delay of 16 hours in the transportation would not in and of itself give the carrier the right arbitrarily to prolong the confinement from the original 36 to 52 hours*, wholly regardless of the time reasonably necessary to reach an unloading point, without incurring the penalty of the statute, if the confinement is willfully and knowingly extended beyond 36, though within 52 hours.

So in the instant case, if conceding 3 hours 20 minutes of excusable delay at Proviso and

Brighton Park, the jury nevertheless found from the evidence that the confinement of the stock in question ought not, in the exercise of due diligence by the carrier, to have exceeded the 36 hours, or, if exceeding 36, ought not to have been as long as 39 hours 5 minutes, its verdict would in that regard be justified. [Our italics.]

III.

MAY THE PERIOD OF 16 HOURS' DUTY OF A TRAIN CREW BETWEEN TERMINALS BE EXTENDED BY A CARRIER BY GIVING TO SUCH CREW SHORT RELEASES NOT EXCEEDING AN HOUR AND A HALF TO COVER THE TIME IT IS FORESEEN THAT SUCH CREW MAY BE DETAINED AT A WAY STATION FROM ANY OF THE USUAL CAUSES OF RAILROAD OPERATION?

Not every brief intermission from active work breaks or interrupts the continuity of time "on duty." Such a period of release must be of sufficient duration to really afford relaxation from the strain of service.

This court in *United States v. Northern Pacific Ry. Co.* (213 Fed., 539), said:

No doubt in extreme cases the court may declare as a matter of law that a given period is so short as not to break the continuity of the service.

The brief period of intermission from active service in this case in no instance being more than an hour and a half afforded no substantial opportunity for rest. The time involved was so short that they were

“trivial interruptions” and not of sufficient duration to afford substantial rest.

Cases involving such short releases of service are: *United States v. Chicago, Milwaukee & P. S. Ry.* (197 Fed., 624-627); *United States v. Denver & Rio Grande R. Co.* (197 Fed., 629); *United States v. Oregon Short Line Railroad Company*, in the District Court of the United States for the District of Utah (not officially reported).

Brief interruptions such as time necessary for meals while on the road, meeting trains, waiting for orders, delays on account of the congestion of traffic or while waiting for an engine or for local switching can not be considered time off duty, although during such periods of detention no active service was required of the employee. It is clear that such brief intermissions do not afford reasonable opportunity for rest and recreation.

It is clear in the case at bar from the evidence in the record that the release is not one given to the employees for the purpose of giving them an opportunity for rest, but is merely given to cover the delay at Colton in order that local switching might be done there for the purpose of prolonging the period of the service of the employee and postponing the time of his final release.

In the case of *United States v. Minneapolis & St. Louis Ry. Co.* (236 Fed., 414), District Judge Wade held that under ordinary circumstances two hours or 2 hours and 20 minutes is not a period of “substantial rest” or an “opportune period” of rest.

In that case the court said:

Sixteen hours' continuous service is a long service in such work. The employees in this case were out upon their trip 17 hours and 40 minutes, 17 hours and 15 minutes, and 17 hours and 55 minutes, respectively; out of 24 hours there was less than 7 hours left. The periods of release in the very nature of things could not be periods of "substantial rest."

When in conjunction with the brevity of the release it is considered as this court said in *Northern Pacific Ry. Co. v. United States* (220 Fed. 108), that

The run of the crew was not ended; it remained the crew of the train, temporarily relieved because of delay.

that they were subject to call; that they were paid for the time covered by the delay; that there was in fact no substantial rest; that while the employees got lunch and walked about the yards and station and sat in the caboose, there is no contention that in fact they secured any substantial rest, it is so evident and clear that there was no substantial and opportune period for rest according to the test laid down by this court, that the request for an instructed verdict for the plaintiff should have been complied with, and a peremptory instruction in accordance therewith given to the jury.

IV.

A RELEASE FOR AN INDEFINITE PERIOD UNDER THE CIRCUMSTANCES INVOLVED DID NOT EFFECT A BREAK IN THE CONTINUITY OF THE SERVICE.

This question arises by reason of the refusal of the trial court to give the instructions requested by the plaintiff and made the basis of the assignments of error 12 to 15, inclusive.

The testimony relative to the nature of the releases given to the employees at Colton presented to the jury the questions as to whether such releases were for a fixed and determined period. It is submitted that a consideration of all the evidence leads irresistibly to the conclusion that the releases were indefinite as to time, but, viewing it in the light most favorable to the defendant, if the question was left for the jury's determination, the instructions requested by the plaintiff should have been given. If the crews did not know when they would be needed and were waiting, although inactive, still they were on duty within the meaning of the statute involved. The courts are unanimous as to the proposition that where a release is for an indefinite period, and given under circumstances such as existed in each of the instances at Colton, such release does not break the continuity of the service. *M. K. & T. Ry. Co. v. United States* (231 U. S. 112); *Southern Pacific Company v. United States* (222 Fed. 46); *United States v. C. M. & P. S. Ry. Co.* (197 Fed. 624); *United States v. D. & R. G. R. R. Co.* (197 Fed. 629); and

United States v. P. R. R. Co., decided by Orr, district judge, for the Western District of Pennsylvania, December 24, 1915 (not yet reported).

This court in the *Southern Pacific case* (222 Fed. 46), did not hold that if the release was for an indefinite period it still remained a question for the jury to say whether under the circumstances there was a substantial and opportune period for rest. To have so held would have been contrary to the decisions cited with approval, one of which was the *M. K. & T. case, supra*, decided by the Supreme Court of the United States. It is to be observed that the cases referred to as being within the twilight zone are those where the releases are for a definite period, and that where the release is for an indefinite period the court may as a matter of law find or direct a jury to find that while so released the crews are on duty and, as said by the Supreme Court, "Their duty was to stand and wait."

A release for an hour and a half, "or until called" is as indefinite in its duration as a release *until* called.

The apparent definiteness of the fixed period becomes entirely indefinite when qualified by the alternative "or until called."

As a whole the release from duty is coupled with the obligation to be ready to resume service whenever the requirements of the carrier made it advisable to call upon the employees for service. The court by its quite full reference in the former *Southern Pacific case* to the decision of District Judge

Rudkin, District Judge Pope, and the case of *Missouri, K. & T. Ry. Co. v. United States* (231 U. S., 112) clearly intended to point out the necessity of a release for a fixed and determined period of time to break the continuity of service.

That the opinion of this court was so intended was the interpretation given to it by District Judge Sawtelle when that case was retried in the district court. In charging the jury he said:

A release, even though bona fide, in order to remove the employee from the application of the law for the time covered by such release, must be for a definite period. The mere wording of the release may not alone be a sufficient guide as to its character and purpose, though it may be considered, and in considering the question of whether such release was for a definite period, the jury may look at all the surrounding circumstances, the place of the release, the real purpose or object sought to be attained, and particularly the right of the company to cancel such release, if they retained such right, before its termination. Such release must be definite and certain as to the period of time, and substantial and opportune as to the period of rest; otherwise, the duty is a continuous one.

If you believe from the testimony that the so-called releases at Bowie were given for the purpose of extending the time of the crew with relation to the 16-hour period, and that during the period of such releases the members of the crew were expected to hold themselves available and in readiness to proceed toward

their destination at Benson as soon as circumstances would permit, you are instructed to find for the Government as to each of the six counts of the declaration or complaint.

The opinion of this court in the *Southern Pacific Company case* was recently cited by District Judge Wade in the case of *United States v. Minneapolis & St. Louis Railroad Company* (236 Fed. 414), as authorizing the construction that the release of the employee must be *definite* and *certain* as to the period of time. In that case the court said:

After a careful study of all the cases I am content to adopt the conclusion in *Southern Pacific Co. v. United States* (Ninth Circuit, 222 Fed. 46), which recognizes the rule that there may be "intermissions" of such period and under such circumstances as to break the continuity of the service. In this case it is held, and in my judgment properly held, that whether these intermissions are such as the law will recognize depends upon their character as periods of substantial rest.

It is also held "*that the release of the employee must be definite and certain* as to the period of time and substantial and opportune as to the period of rest. A release for meals or to stand and wait for another train is not sufficient. There must be a substantial and opportune period, otherwise the duty is a continuous one." * * *

I am not prepared to hold that an absolute release for a period of two hours at a time other than at mealtime would not be such a period as might be considered "substantial

and opportune" for rest. No arbitrary period can be fixed. The circumstances must determine. Sixteen hours' continuous service is a long service in such work. The employees in this case were out upon their trip 17 hours and 40 minutes, 17 hours and 15 minutes, 17 hours and 15 minutes, and 17 hours and 55 minutes, respectively; out of 24 hours there was less than 7 hours left. The periods of release in the very nature of things could not be periods of "substantial rest." Rest is largely psychological. The circumstances must be such as to induce rest. The problem is not solved by saying that the men could have gone to bed and slept for an hour, or 1 hour and 20 minutes, aside from the time they were at their meals. We are dealing with human nature. The public is interested in actual rest—not in opportunities for rest—and while I realize that the employer can not be held responsible for failure of employees to rest when the opportunity is given them, yet I feel that the opportunity, to be "substantial and opportune," must be under such circumstances that the average employee will in fact rest. [Our italics.]

And that this is the true rule of law seems to be clear from the citation with apparent approval in *Missouri, K. & T. Ry. v. United States* (231 U. S. 112); of the case of *United States v. Chicago, M. & P. S. Ry. Co.* (197 Fed. 624), in which Judge Rudkin said:

If a railroad company may relieve its employees for service during meal hours, it may

also relieve them from service every time a freight train is tied up on a siding and *thus defeat the very object the legislature had in mind.*

and the case of *United States v. Denver & R. G. R. R. v. United States* (197 Fed. 627).

In the case of *Pennsylvania Railroad Company v. United States*, in the District Court of the United States for the Western District of Pennsylvania (not reported), in an opinion filed December 24, 1915, Orr, district judge, said:

There are 10 separate causes of action in each of which the defendant is charged with permitting an employee to remain on duty longer than the period fixed by the act. In each cause of action during the period of employment therein stated there appears to have been granted to the employee a period of relief from the performance of work. If the period of relief in each case had been from the performance of duty, as well as a period of relief from the performance of work, there might have been no violation of the act, because the excess service charged in each case did not equal the period of relief. The period of relief, however, was a period in which the employee was required by rule to be subject to call. In other words, during such period of relief the employee was not free to go where he pleased, or do what he pleased, because he was under the duty of remaining within call when needed for further service. Such periods of relief varied, in the cases now under consideration, from 35 minutes to 2 hours and more. At certain places where periods of

relief were granted, the employees were required to remain in the rest house or bunk room, and at another place where there was no rest house or bunk room, they were required to state where they could be found when needed. During these periods of rest none of the employees were required to have supervision over engines, cars, or other instrumentalities of travel. The system by which these periods of relief were granted and the men controlled during the same, was apparently adopted by the company in good faith and without any attempt to evade the provisions of the statute. The services required of the men upon duty may be included in the term "pusher" services; that is, the assisting of other trains which by reason of the loads being hauled, or the condition of the engines, needed additional assistance in the shape of motive power. When such pusher services would be required could not reasonably be definitely anticipated. The trips required were comparatively short, and therefore quite often repeated. The difficulties in properly arranging such service is no excuse for the violation of the law, and yet should be taken into consideration in fixing the penalties for such violation. The railroad company seems to have acted in good faith and without harshness to its employees, because the periods of relief appear to have been longer than the excess service. However, such periods of relief, to be credited upon total service, should have been periods of freedom instead of periods of restraint.

The assistant superintendent of the Southern Pacific Co. at Los Angeles who had supervision over these trainmen testified that under the system applicable to these employees they were released at Colton "until they were called to leave."

* * * "The release was for an indefinite period."

* * * "They are paid for every minute they are at Colton. That is between terminals. That is because they had not reached their destination. The release at Colton differed from the releases at their terminals in this: At Colton they are in the middle of their run. At their terminals they are at home." (Rec., p. 182.)

"The stops at Colton are made to arrange the trains for continuing on from that point." (Rec., p. 184.)

Under such circumstances the plaintiff would seem clearly to have been entitled to the instruction requested that if the jury should find that the releases were not for a definite and fixed period they did not operate to break the continuity of service.

V.

SUCH RELEASES BETWEEN TERMINALS ARE NOT TO BE REGARDED AS TIME OFF DUTY WHERE EMPLOYEES ARE PAID FOR THE TIME COVERED BY SUCH RELEASE.

The evidence discloses that the time covered by the releases in question here was time paid for by the carrier, "every minute" of it.

In explaining why it was paid for by the carrier the witness, one of the officials of the company, explained

clearly that there was a difference between a release of the character here in evidence and a release at the final terminal. This explanation makes clear the ruling of this court in a former case. "They were still the crew of the train temporarily relieved because of delay."

In the payment of the men it is evident in the case at bar that all the time of a train crew on its run between terminals including time of delays and intermissions covered by the releases in evidence was for the purpose of the payment of wages regarded as time "on duty."

If the relations between the crew and the carrier were such that under their contract of service payment for the time covered by such intermissions was due and made therefor, it is reasonably presumable that the time was company time and was time "on duty."

Time paid for by the carrier belongs to the carrier and is therefore not a time of freedom but of obligation.

Time during which employees are "subject to call" and for which employees are paid is time on duty within the meaning of the act, when considered together with the brevity of the so-called release periods; the fact that the release covered a period of detention of the train from the ordinary occurrences of railroad operation; that one of its purposes was to enable the carrier to extend the time of the final release from duty and that it occurred while the em-

ployees still remained the crew of the train which was, though temporarily delayed, still in the course of its journey to its ultimate destination.

VI.

WHERE CONDITIONS RESULTING FROM A CAUSE COVERED BY THE CASUALTY PROVISIO ARE KNOWN WHEN A TRAIN LEAVES A TERMINAL, EXCESS SERVICE OF THE CREW OF SUCH TRAIN CAN NOT BE JUSTIFIED UNDER THAT PROVISIO.

When a train starts out from a terminal after all conditions resulting from a cause justifying excess service under the casualty proviso are known, the carrier then has full opportunity to make such arrangements as will prevent the train crew from remaining on duty longer than 16 hours.

If delay of a train was the necessary result of the *conditions known*, such result could readily be foreseen.

Such delay was the result of a cause known to the carrier before the employees left a terminal and could have been foreseen.

This question was before the Eighth Circuit Court of Appeals in *Denver & Rio Grande Railroad Company v. United States* (233 Fed. 62). In that case the court said:

Counts 6 to 10 involve the crew in charge of a train from Helper to Salt Lake City, a distance of 114 miles. Before this trip was entered upon an accident had occurred to another train, involving the derailment of 14

cars. Defendant's train dispatcher knew of this accident before the train here involved left Helper, and directed it not to leave that point until further orders. About that time he received telephonic advice from the conductor of the wrecked train that the track would be cleared for traffic within 20 or 30 minutes after the arrival of a derrick. A derrick was sent forthwith from Helper, arriving at the scene of the derailment about 7 a. m. The train dispatcher, relying on the advice given him as to the time it would take to clear the track, ordered the train in question to leave Helper for Salt Lake City at 6.30 in the morning. He did this without waiting to see what time would be necessary to clear away the wreck. Much more time was, in fact, consumed than was anticipated, and when the train approached the point where the wreck occurred it was detained, and this caused the keeping of the crew on duty for a longer period than 16 hours. The point at which the derailment occurred was only 6 or 7 miles from Helper, and telephonic communication existed between the points. No reason is shown why the train was ordered to leave this terminal before the derrick had actually arrived at the scene of the wreck and some progress had been made in removing it. There was no excuse for acting on first impressions as to the time that the line would be obstructed. In our judgment, therefore, the trial court was right in directing a verdict in favor of the plaintiff as to these counts.

In the case of *United States v. Great Northern Railway Company* (220 Fed. 630), the Seventh Circuit Court of Appeals said:

Looking at the proviso as a whole, and with the intent of leaving, if possible, vitality in all its parts, we conceive that Congress said to the railroads: You need not pay penalties for violations in the following instances:

Act of God—You are excusable for delay caused by violence of nature in which no human agency participates by act or omission. For example, a washout due to an unprecedented flood *that was not and could not reasonably have been anticipated.*

Unavoidable accident—You are excusable if at the time and place of the accident that caused the delay you, through your employees, were in the exercise of due care. For example, a switch tender falls dead at an open switch and a collision immediately follows without anyone's fault.

Last clause of the proviso—Explanatory of unavoidable accident. But you are not excusable *if at the time a train leaves a terminal you, through your inspectors, either knew or, by the exercise of due care, might have foreseen a cause that would be likely to produce an accident and consequent delay.* [Our italics.]

In the case of *United States v. Missouri, Kansas & Texas Railway Company of Texas* in the District Court of the United States for the Eastern District of Texas, decided May 30, 1912 (not reported), Russell, district judge, in the course of his charge to the jury said:

Another excuse offered is that the train was delayed three hours in order to go from Royce City to Greenville for water, and it was stated that there had been in this country a very great scarcity of water for quite a while, and it appears that the only water station at which the supply could be replenished after leaving Dallas was Greenville. The defendant company knew that fact, knew there was no water at Royce City, and that the engine could not procure water anywhere after leaving Royce City, and that the engine could not procure water anywhere after leaving Dallas until it reached Greenville, and, therefore, if one water car was not sufficient they should have attached two, or whatever number was necessary, to supply the engine until it reached Greenville, and I do not think that excuse falls within the proviso attached to the act.

(This was the case finally affirmed by the Supreme Court of the United States, 231 U. S. 112.)

The general tenor of the decision in *United States v. Atchison, Topeka & Santa Fe Railroad* (212 Fed., 1000), is not supported by this court in a later case between the same parties, but Judge Sawtelle in his opinion in that case properly excepted from the application of the proviso instances "in which the officers or agents in charge of the employees knew, or could have foreseen, the existence of the cause of the delay at the time such employee left the terminal or starting point" (p. 1006).

There is, under circumstances where a train leaves a terminal after casualty conditions are known, ample opportunity to prevent the excess service to relieve the crew.

Train service need not be abandoned. A sufficiency of men either on the train or at available points on the road will avoid excess service even without tying up the train at some intervening side track. Though as to freight trains under ordinary conditions even the latter course is preferable to working the crew beyond 16 hours.

CONCLUSION.

The refusal to give the instructions requested by the Government was error. The plaintiff was entitled to a peremptory instruction because (1) no causal connection was shown between the flood conditions and the detention on duty of the train crew; (2) the time of service of the train crew was extended by short releases during which this crew was subject to immediate recall if required by the carrier and was paid the same as during the indisputable "on duty" periods; (3) during all the time covered the train crew in each instance remained jointly the crew of its train temporarily detained but charged with the duty of continuing the run of the train, when ready, to its final terminal; and (4) all the conditions resulting from the flood were known before the train involved in counts 7 to 12, inclusive, left its initial terminal, and excess service, if any resulted therefrom, could have been foreseen.

The judgment should therefore be reversed and a new trial ordered.

Respectfully submitted.

ALBERT SCHOONOVER,

United States Attorney.

PHILIP J. DOHERTY,

Special Assistant United States Attorney.



No. 2790.

United States Circuit Court of Appeals

Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

VS.

THE SOUTHERN PACIFIC COMPANY,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE SOUTHERN DISTRICT
OF CALIFORNIA, SOUTHERN DIVISION.

REPLY BRIEF AND ARGUMENT OF
DEFENDANT IN ERROR.

HENRY T. GAGE and

W. I. GILBERT,

For Defendants in Error.

Filed

APR 25 1917

F. D. Monckton,

No. 2790.

United States Circuit Court of Appeals

Ninth Circuit.

THE UNITED STATES OF AMERICA, <i>Plaintiff in Error,</i> VS.	}
THE SOUTHERN PACIFIC COMPANY, <i>Defendant in Error.</i>	

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE SOUTHERN DISTRICT
OF CALIFORNIA, SOUTHERN DIVISION.

REPLY BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

In this cause there are in our judgment but two questions to be considered, and those are, first, whether or not the release at Colton constituted a recognizable break in service, and, second, whether or not the jury were justified in finding that the run covered by Counts 13 to 18 inclusive of plaintiff's complaint, would be relieved by virtue of a condition for which the defendant company could

not be held responsible, by reason of the fact that the condition as it existed was the result of an unprecedented rainfall, the extent and character of which could not be accurately ascertained insofar as it might affect the time to be used in making the run by the defendant company at the time the crew started. All of the facts except as to the unprecedented character of this flood were covered by a stipulation, and this stipulation is set out in full on pages 3 to 7 inclusive of the opening brief and argument of plaintiff in error. Much of the testimony is quoted in plaintiff's brief upon this particular phase, from pages 8 to 14 inclusive. However, not all of the testimony of witness L. G. Sloan appears in plaintiff's statement. On page 181 of the Transcript, in answer to a question propounded to Mr. Sloan, he stated:

"They were released from duty on their arrival until they were called to leave.

Q. Until they were called?

A. Yes. 'Released until called' meant that they understood they were off duty. That they were not in any way employed. They are absolutely free. And they would be called when they would be needed, just the same as for their initial trip. The release was for an indefinite period."

It might be well to remember that all of this testimony now being quoted was the testimony of the witness Sloan, while he was on the stand testifying in behalf of the plaintiff. See Transcript, p. 179.

On page 183, this witness, under the direction of the Government, takes up in consecutive order

a great deal of the time covered by the various counts relied upon by the plaintiff, and under the direction of the United States Attorney, directly and positively negatives the idea or theory that the train crew worked in excess of the statutory period.

And on page 185 he testifies that the very object of the lay-over was to furnish the break in the service which would enable the work to be done, and at the same time comply both with the letter and the spirit of the law, and that applies to all of the counts in the complaint except the one of February 27th, which will be discussed at a later point in this brief, in connection with the defense of unprecedented flood.

The question as to whether or not these periods of rest at Colton were indeed periods of rest and recreation, and thus a break in the service, was a question of fact for the jury, which was fully and completely submitted to them under the charge of the Court, as was said by the Court on page 203 of the Transcript:

“There may be cases where the release from duty of an employee of a railroad company, is so brief, or where the circumstances are such that the Judge may say that the claim that the continuity of the hours of service has been broken, would be a mere sham and a pretense, and the Court would not recognize such a case as being a compliance with the law. On the other hand, there may be cases where the release from the service of the employee, is of such length of time, and is surrounded by such circumstances that the

Court could say that no fair-minded man could dispute the statement that the employee had a fair and reasonable opportunity for rest and recreation, and that the law in such cases had been complied with. Then there may be other cases, where neither of these extremes exist; cases that occupy the middle ground between these extremes; cases where, although there may not be any dispute as to the facts of the case, it is necessary to apply the proven circumstances to the situation in order to determine whether or not the law has been complied with.

I have decided that this case occupies the third situation described. That is to say, it falls within that twilight zone between the two extremes, as above described. I therefore instruct you that you are to apply the probative facts and the proven circumstances in this case, to the situation, and determine whether or not, during the time the employees were released, they had a reasonable and fair opportunity for rest and recreation.

In determining whether or not the men had a reasonable opportunity for rest and recreation during the time that they were released from duty, you shall take into consideration all the facts and circumstances connected with such release; whether it was a release in good faith, and whether or not the men had, during the time they were released, a right to do as they pleased; whether they were masters of their own time, and whether they really had a substantial and opportune period of rest.

If you find, as aforesaid, that the release from duty at Colton, was a break in the hours of service, within the meaning of the law as I have explained it to you, then you should find for the defendant upon that issue, but if, on the other hand, you should find that the employees were not released in such a manner that they were masters of their own time and did not have a reasonable and fair opportunity for rest and recreation, you should find for the plaintiff upon that issue."

Thus, it will be seen that the Court properly held that this case was within what it saw fit to term the "twilight zone"; that it was a question of fact for the jury to determine whether or not the release at Colton was a release in good faith and so regarded by the Company and its employees, or whether or not it was a subterfuge merely to cover the real design of the parties. Having been fully and fairly submitted to the jury, we believe that we are justified in saying that their finding upon that issue should be considered by this Court, as it was by the trial Court, to be final.

Again, the testimony of Mr. W. H. Whalen, Superintendent of defendant Company, pages 175-6 Transcript, reads:

"That crew on that day proceeded to Indio and were released at Colton for an hour and thirty minutes. That meant that they were absolutely released from responsibility. I did not hear any of them testify here today that they were released for a definite time. When they are released they can do anything they see fit.

When released they would probably say, 'You will find me at such and such a place. I will be down at the bunk-house or at the hotel or getting lunch.' At the expiration of one hour and thirty minutes. They are told, 'You are released'. They will say, 'All right, I am going down and get some sleep', or 'All right I am going over to the lunch counter and you will find me there when you want me'. When these men were released they did not know when they would be called again. They might not be called for two hours or they might be called within an hour. The form is 'You are released.' That means that he is released from responsibility until called. * * * When a man is released, when he is notified he is released, he doesn't know anything more than that he is released. * * * When these men were released for an hour and thirty minutes in these particular cases, that meant that they were released, that they were as free men as there is in the world, until the call-boy gets them again."

And this testimony, it will remembered, was testimony offered under the direction of the United States Attorney, on the part of the Government of the United States, and it is in contravention of the testimony offered by him that he contends the jury should have found in his favor.

We now desire to discuss the question of unprecedented flood as applying to those counts submitted to the jury on that issue, with reference to February 27th.

It seems that the theory, so far as the unprecedented flood is concerned, is perhaps best stated in the discussion between Mr. Walter, representing the Government, and the Court as to the admissibility of the testimony. The witness, L. G. Sloan, was asked: (Transcript, page 186.)

“With reference to February 27th and the days previous to that time, you may tell the jury what the condition of your tracks was, beginning on about the 18th day of February and from then on up until the 27th.

MR. WALTER: “We object to that as immaterial. The statute says that in case of casualty, unavoidable accident or act of God, and where the delay is the result of causes not known to the officers or the crew at the time the crew left the terminal, the statute does not apply. Now, if his testimony is confined to this particular day, and it shows that this heavy rainfall and flood occurred after the crew left the terminal, we have no objection; but we do object to his testifying to the condition of the weather a week before the crew left the terminal. We think under the ruling of the United States Circuit Court of Appeals and other courts this does not apply unless these conditions arise after the crew leaves the terminal.

THE COURT: “The statute is: ‘The provisions of this act shall not apply in any case of casualty or unavoidable accident, or the act of God, nor where the delay was the result of a cause not known to the carrier or the officer or agent in charge of such employee at the

time such employee left the terminal, and which could not have been foreseen.'

"Now, of course, if this flood and rain could have been foreseen, and they knew before the train left the terminal that this accident was going to happen, this act would not apply; no doubt about that. It is as plain as A, B, C. But I think that the evidence has got to be taken so that the jury can determine the facts. It is a question for the jury whether that is a fact or not. Now, a rain may have come and it may have poured down like in the days of Noah, but the flood may not have come until after the rain was over, and the tracks may not have been washed out until after the train left the terminal. We cannot tell until the evidence is put in."

MR. WALTER: "Now, I suggest, your Honor, that if a rain has fallen,—I understood him to ask as to the 18th or along about that time —

THE COURT: "Well, you perhaps do not understand this country. The rain may start in on Monday, and it may rain Monday and Tuesday and Wednesday, and then on Thursday there will be a flood that will wash out bridges and tear up roads and do a good deal of damage, and this rain continuing all the time, the ground gradually gets soaked up, and you can't tell where the flood is coming from. These jurors all know about this country, and they will probably take into consideration their own knowledge in regard to those conditions

in this country and these floods, with the proof that may be offered”.

And again: (THE COURT) “Now suppose the rain had been falling for three or four days and the track was wet and soft, and the ground was soaked, and these trains leave the depot, and then there comes a cloudburst, or an unprecedented flood in some particular part of the valley, when it is easy to wash out the track or wash out the bridge: Don’t you think the jury would have a right to take those things into consideration?”

MR. WALTER: “Well, it seems to me, your Honor, if the track is already wet and soaked —

THE COURT: “Is it your idea that they should not send out a train then?”

And again on page 190 (Testimony of L. G. Sloan)

“The morning of the 26th was the first time I got across El Monte bridge. On the 26th and 27th we moved all of this delayed freight. The storms had made the roadbed very soft and we had all kinds of slow orders, safety first being the slogan. * * * We were two nights there trying to get trains for 25 miles along in there. The roadbed on the side was all washed out and we would put ballast and ties and everything along just to get over it, and I see by the train sheet on the 27th that every train coming along there lost — a passenger train would lose as much as one

hour from Colton to Los Angeles on account of track conditions. A freight train would lose — I would say if they got over to Colton from Los Angeles in less than three hours it would be an extra run. You see they have to keep clear of all those passenger trains. Now here is the Golden State Limited on the 27th. He was 50 minutes making the 30 minute run from Colton over towards Ontario on the 27th. That was the day that the other freight train was operated. All trains show a delay of lost time in there. The dispatcher's notes show the time lost on account of soft tracks, slow orders, etc. It was necessary to restrict the speed of all trains to that of safety in that vicinity, and it was many days before we got the track fixed up so that they could make anything like reasonable speed. THERE WAS NO WAY BY WHICH IT COULD BE DEFINITELY DETERMINED BY THE DISPATCHER AS TO WHAT TIME COULD BE MADE ON THIS SOFT TRACK. That was a matter which was necessarily placed largely in the discretion of the crew in actual operation. When the freight train under those conditions left Los Angeles the dispatcher couldn't tell whether he could move to Colton in six hours or nine hours. In the first place the track conditions and the slow trains he had to meet and his delay waiting for them and then other delays waiting for him when he got started over this slow trip. It was awfully slow work and delays trains something terrible. So far as I am concerned, I

know of no way of foreseeing this track difficulty. I couldn't tell how much they were going to lose.

Then again, the testimony of J. B. Lippincott, at page 194, reads:

“ * * * I would say that the rainstorm of February, 1914, according to the records of the Weather Bureau here began with great violence on the 18th of February, at Los Angeles, and extended until the 21st of February, both inclusive. The floods that were produced by that storm in the San Gabriel Valley and in that region, according to observations which I personally made, and which were made under my immediate direction, were the greatest flood discharges that I have ever known of in this portion of California or in any other portion of California, when you consider the flood in terms of flood discharge per square mile of rain space, as we had a very, very wet month preceding, with immense floods in January. * * * When a flood falling on the 21st of February, say, as a matter of illustration, at 3 o'clock in the afternoon on the 21st day of February — the actual and direct effect of that flood does not end with the flood itself. It is very different in drainage basins. If you take a drainage basin or catchment basin of a small stream, that is, very short and precipitous, you get a flood very quickly. You would get one from the Rubio Canyon or some of those other canyon or

drainage basins between Pasadena and Azusa, such a flood, but when you come to San Gabriel River, which is a drainage basin of 220 square miles in area, these floods do not respond as quickly, and they are drawn out longer in duration. If you have a country that is fairly saturated with water by protracted rains, the floods in lesser volumes are pretty well sustained."

This testimony is uncontradicted, and as heretofore stated, a large portion of it proven by witnesses placed on the stand by the plaintiffs themselves.

We think no question can exist but that the defense of an unprecedented flood such as applies to the counts now under discussion, was properly a question for the jury. We contend it was fully and fairly submitted to the jury under the Court's charge, and having found upon that issue with testimony to support the findings, the rule is practically unbroken that the finding of the jury will not be disregarded.

As was said in the case of *United States vs. Lehigh Valley R. Co.*, 219 Fed. 532:

"Where the casualties or unavoidable accidents relied on by a railroad company to exempt it from liability for violating the federal Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1415 — Comp. Stat. 1913 — Sec. 8677) were an unusually high wind while a train was going up a grade, a broken tail pin, and a hot box, and there was

testimony as to the nature of the flaw in the tail pin, and also as to what had been done as to packing and inspecting the bearing that heated, the government was entitled to submission of the question whether the delay was due to unavoidable accident, or to causes which might have been avoided by proper foresight and inspection, to the jury."

And again, in the case of *United States vs. Delaware, L. & W. R. Co.*, 218 Fed. 608:

"Where issues were fully reviewed, and the contentions of both parties carefully submitted to the jury by a charge to which no exception was taken by the government, the verdict was conclusive as to the facts on the government's writ of error."

And again on page 610, quoting from the same decision:

"The case at bar was submitted to the jury under a charge which construed the section, stated the issues, reviewed the testimony and the contentions of both sides, and carefully instructed the jury as to what questions they were to decide. The government took no exception to the charge; it submitted a few requests to charge, which were all complied with. Under these circumstances the verdict is conclusive as to the facts in controversy, and no error is pointed out".

In the case of *C. W. Hull Co. vs. Marquette Cement Mfg. Co.*, 208 Fed. 260, it was held:

“A verdict upon an issue of fact based upon sufficient evidence is conclusive on appeal.”

See also the case of *Pennsylvania Casualty Co. vs. Whiteway*, 210 Fed. 782, which holds:

“A verdict is not reviewable unless there is entire absence of substantial evidence to sustain it.”

And again, in the case of *Southwestern Brewery & Ice Co. vs. Schmidt*, 226 U. S. 162, it was said:

“Whether there was credible evidence to sustain a verdict was for the jury, and not for the appellate court.”

And in the case of *American Mfg. Co. vs. Maslanka*, 203 Fed. 465, which held:

“A verdict based on conflicting evidence will not be set aside on writ of error, as against the weight of evidence on an issue properly submitted to the jury.”

Likewise, in the case of *Indian Refining Co. vs. Buhrman*, 220 Fed. 426, where it was held that a verdict rendered on conflicting evidence is conclusive.

It might be noted in this connection, that there can be no question but that if it were a question for the jury to determine, that the issue was fully

and fairly submitted to this jury by the Honorable Judge presiding.

As was held in the case of *United States vs. Atchison, T. & S. F. Ry. Co.*, 212 Fed. 1000:

“Where a passenger train was delayed after the train crew had left their starting point, by the derailment of a freight train, resulting in the passenger crew being required to remain on duty more than 16 hours, the railroad company was not bound to tie up the train at the first stopping place where its crew could have been replaced, but was entitled, without incurring liability, to operate the train to the end of the passenger crew’s run, the word ‘Terminal’ as used in such section being synonymous with ‘the end of the run’ of the particular employe involved.”

This case discusses the general principles of the Hours of Service Law to a greater extent than any of the cases cited by either of the parties to this action.

We feel that an examination of the record will disclose that all of the issues were fully, completely and properly submitted to the jury, that their verdict is amply supported by the testimony, and for this reason the cause should be affirmed.

Respectfully submitted.

HENRY T. GAGE and

W. I. GILBERT,

Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit

THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,
 Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners,
 Appellees.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,
 Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,
 Appellees.

Transcript of the Record

*Upon Appeal From the United States District Court
 for the District of Idaho, Southern Division.*

United States
Circuit Court of Appeals
For the Ninth Circuit

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Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,
Appellees.

Transcript of the Record

*Upon Appeal From the United States District Court
for the District of Idaho, Southern Division.*

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Names and Addresses of Attorneys of Record.

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For Appellee, Guy I. Towle.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

In Equity No. 526

THE EQUITABLE TRUST COMPANY OF NEW
YORK, as sole Trustee under a Deed of Trust
made by Great Shoshone and Twin Falls Water
Power Company, dated May 1, 1910, and Supple-
mental Mortgages dated June 21, 1911, and April
7, 1913, *Complainant,*

AGAINST

GREAT SHOSHONE AND TWIN FALLS WATER
POWER COMPANY, a Corporation, WILLIAM
T. WALLACE as Receiver of Great Shoshone and
Twin Falls Water Power Company, GUY I.
TOWLE, and CARL J. HAHN as Administrator
of the Estate of Harry M. King, deceased,
Defendants.

BILL OF COMPLAINT

*To the Honorable the Judges of the District Court
of the United States for the District of Idaho,
Southern Division:*

The Equitable Trust Company of New York, a
corporation organized and existing under and by
virtue of the laws of the State of New York, as
Trustee under a certain Deed of Trust made by Great
Shoshone and Twin Falls Water Power Company,
dated May 1, 1910, and Supplemental Mortgages
dated June 21, 1911, and April 7, 1913, brings this
bill of complaint against the above named defend-

ants and thereupon your orator respectfully shows:

First. Your orator is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business at No. 37 Wall Street in the Borough of Manhattan, City of New York, in said State, and is authorized by law and its Certificate of Incorporation to accept and execute trusts of the character hereinafter set forth.

Second. Your orator is informed and believes and therefore alleges that the defendant Great Shoshone and Twin Falls Water Power Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, of which State it is a citizen, and having its statutory office in Wilmington in the said State, but has all of its property and business in the State of Idaho, where it is duly licensed to carry on such business and where its principal office and place of business is at Twin Falls, in Twin Falls County; and that the defendant William T. Wallace is a citizen of the State of Idaho and a resident of Twin Falls County in said State; and that the defendant Guy I. Towle is a citizen of the State of Idaho and a resident of Lincoln County in said State; and that the defendant Carl J. Hahn as administrator of the estate of Harry M. King, deceased, is a citizen and resident of the State of Idaho.

Third. Heretofore and prior to the 21st day of July, 1910, the defendant Great Shoshone and Twin Falls Water Power Company, in the exercise of its lawful powers and in accordance with resolutions

duly passed by its Board of Directors at a meeting thereof duly called, convened and held, and in accordance with the consent of all of its stockholders thereunto duly given, duly authorized the issue of a series of bonds to be issued in an aggregate principal sum not exceeding Ten Million Dollars (\$10,000,000), said bonds to bear interest at the rate of five per cent (5%) per annum, payable semi-annually on the first days of May and November in each year, to bear date the first day of May, 1910, to be payable the first day of May, 1950, and to be issued in denominations of \$25,000, \$1,000 and \$500, by the terms of which bonds said Great Shoshone and Twin Falls Water Power Company promised to pay to the bearer, or, in case of registration of any bond to the registered holder thereof, the principal amount of said bond in gold coin, lawful money of the United States of America, of the then existing standard of weight and fineness, at the banking house of The Trust Company of America in the City of New York, on May 1, 1950, and to pay interest thereon semi-annually in like gold coin on the first day of May and the first day of November in each year until the payment of said principal sum, upon presentation and surrender of the coupons attached to said bonds at said banking house of The Trust Company of America in the City of New York, as such coupons severally became due and payable. The form and tenor of said bonds and said coupons are set forth at length in the Deed of Trust dated May 1, 1910, hereinafter more particularly referred to.

Fourth. On or about the 21st day of July, 1910, said Great Shoshone and Twin Falls Water Power Company, being thereunto duly authorized by the action of its Board of Directors, and with the due consent of all of its stockholders, duly made and executed to The Trust Company of America, of the City of New York and State of New York, a corporation organized and existing under the laws of the State of New York, and James D. O'Neil, of the City of Pittsburgh, State of Pennsylvania, as Trustees, its certain Deed of Trust bearing date May 1, 1910, a copy of which is annexed hereto and filed herewith, marked "Exhibit A," to which your orator prays leave to refer with the same effect as if it were fully set forth in this bill of complaint. In and by said Deed of Trust, said Great Shoshone and Twin Falls Water Power Company, in order to secure the due and punctual payment of the principal and interest of all of the aforesaid bonds issued and at any time outstanding, granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over unto the said The Trust Company of America and James D. O'Neil as Trustees and their successor or successors in the trusts therein created, all of the various parcels, premises, properties, rights, permits, plants, dams, reservoirs, flumes, canals, tunnels, raceways, controlling works, machinery, lines, buildings, improvements, water wheels, weirs, generators, dynamos, switchboards, transformers and all machinery, appliances and appurtenances and franchises and all other property,

real, personal or mixed of said Great Shoshone and Twin Falls Water Power Company whether then owned or thereafter acquired as enumerated or referred to in said Deed of Trust dated May 1, 1910, to have and to hold all and singular said plants, works and other property and the rights, privileges and franchises thereby conveyed or intended so to be, together with all and singular the remainders, rents, revenues, incomes, issues and profits thereof and the privileges or appurtenances then or thereafter belonging or in any wise appertaining thereto, unto the said Trustees, their successors and assigns, in fee simple forever, in trust nevertheless, for the equal and *pro rata* benefit of all the holders of said bonds and coupons, without preference or priority by reason of priority in time of issuance or negotiation thereof or otherwise, and for the uses and purposes in said Deed of Trust expressed.

Fifth. The tangible property described in and covered by said Deed of Trust is situated in the Counties of Twin Falls, Lincoln, Elmore, Cassia, Owyhee and Ada in the State of Idaho and elsewhere in the Southern Division of the District of Idaho. Said Deed of Trust was duly recorded in the office of the Recorder of Twin Falls County, State of Idaho, on August 2nd, 1910, and recorded in Book 14 of Mortgages at pages 54 to 88, inclusive, and the fees and taxes thereon paid. Said Deed of Trust was duly recorded in the office of the Recorder of Lincoln County, State of Idaho, on the 18th day of October, 1910, in Book 15 of Mortgages at pages 1 to 63, in-

clusive, and the fees and taxes thereon paid. Said Deed of Trust was duly recorded in the office of the Recorder of Elmore County, State of Idaho, on the 2nd day of September, 1913, in Book 39 of Mortgages at page 210, and the fees and taxes thereon paid. Said Deed of Trust was duly recorded in the office of the Recorder of Cassia County, State of Idaho, on the 13th day of September, 1913, in Book 7 of Mortgages at page 37, and the fees and taxes thereon paid. Said Deed of Trust was duly recorded in the office of the Recorder of Owyhee County, State of Idaho, on the 16th day of October, 1913, in Book 10 of Mortgages at page 250, and the fees and taxes thereon paid. Said Deed of Trust was duly recorded in the office of the Recorder of Ada County, State of Idaho, on the 30th day of September, 1913, in Book 74 of Mortgages, at pages 118-183 and the fees and taxes thereon paid.

Sixth. Thereafter and on or about the 21st day of June, 1911, said Great Shoshone and Twin Falls Water Power Company, being thereunto duly authorized by its Board of Directors and by its stockholders, duly made, executed and delivered to said The Trust Company of America and said James D. O'Neil, as Trustees, a certain instrument or indenture by way of supplemental mortgage bearing date June 21, 1911, a copy of which is hereto annexed and filed herewith marked Exhibit "B", to which your orator prays leave to refer with the same effect as if it were fully set forth in this Bill of Complaint. In and by said Supplemental Mortgage dated June 21, 1911,

said Great Shoshone and Twin Falls Water Power Company, further to secure the due and punctual payment of the principal and interest of all the bonds issued and at any time outstanding under the aforesaid Deed of Trust dated May 1, 1910, granted, bargained, sold, conveyed and confirmed unto the said The Trust Company of America and said James D. O'Neil, as Trustees, and their successor or successors, certain property therein set forth together with all the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion or reversions, remainder or remainders, rents, issues and profits thereof, to have and to hold as Trustees under the aforesaid Deed of Trust, dated May 1st, 1910, upon the trusts, terms and conditions, covenants and requirements set forth in said Deed of Trust, dated May 1st, 1910. All of the property covered by said Supplemental Mortgage dated June 21, 1911, was owned by said Great Shoshone and Twin Falls Water Power Company at the time of the execution of the aforesaid Deed of Trust, dated May 1st, 1910, or was acquired thereafter and was covered by said Deed of Trust, dated May 1st, 1910, and said Supplemental Mortgage, dated June 21, 1911, was executed by said Great Shoshone and Twin Falls Water Power Company as aforesaid by way of further assurance and in accordance with the covenants in said trust deed dated May 1, 1910. All of the property described in and covered by said Supplemental Mortgage dated June 21, 1911, is situated in the County of Lincoln, State of Idaho, and said

Supplemental Mortgage dated June 21, 1911, was duly recorded in the office of the Recorder of said Lincoln County, State of Idaho, on the 30th day of June, 1911, in Book 20 of Deeds at page 208.

Seventh. Said The Trust Company of America duly accepted the trusts created by and under said trust deed dated May 1, 1910, and said Supplemental Mortgage dated June 21, 1911, and became one of the trustees thereunder. Thereafter and in or about the month of February, 1912, said The Trust Company of America was in accordance with the laws of the State of New York duly merged into and became The Equitable Trust Company of New York, your orator, and your orator accordingly succeeded to all the rights, duties, powers and property of said The Trust Company of America under the said Deed of Trust dated May 1, 1910, and under the said Supplemental Mortgage dated June 21, 1911, and has become and now is Trustee thereunder and is now acting as such Trustee.

Eighth. On or about the 7th day of April, 1913, said Great Shoshone and Twin Falls Water Power Company, being thereunto duly authorized by its Board of Directors and by its stockholders, duly made, executed and delivered to your orator, as successor by merger to the hereinbefore mentioned The Trust Company of America, and to the aforesaid James D. O'Neil, as Trustees, a certain instrument, entitled "Supplemental Mortgage", bearing date April 7th, 1913, a copy of which is hereto annexed and filed herewith, marked Exhibit "C", to which

your orator prays leave to refer with the same effect as if it were fully set forth in this bill of complaint. In and by said Supplemental Mortgage said Great Shoshone and Twin Falls Water Power Company, further to secure the due and punctual payment of the principal and interest of all the bonds issued and at any time outstanding under the aforesaid Deed of Trust dated May 1, 1910 (Exhibit "A"), granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over unto your orator and said James D. O'Neil as Trustees and their successor or successors in the trust, certain property, real, personal and mixed, as fully set forth, described and enumerated in said Supplemental Mortgage, to have and to hold all and singular said properties, rights, privileges and franchises thereby conveyed or intended so to be, together with all and singular the reversions, remainders, rents, revenues, incomes, issues and profits thereof and the privileges and appurtenances then or thereafter belonging or in any wise appertaining thereto, in trust and upon the trusts and under the provisions set forth in the aforesaid Deed of Trust, dated May 1, 1910, and subject to all the terms, provisions and conditions therein contained. All of the property, real, personal and mixed, covered by said Supplemental Mortgage dated April 7, 1913, was owned by said Great Shoshone and Twin Falls Water Power Company at the time of the execution of the aforesaid Deed of Trust dated May 1, 1910, or was acquired thereafter and was covered by the aforesaid Deed of Trust, dated

May 1, 1910, and said Supplemental Mortgage dated April 7, 1913, was executed by said Great Shoshone and Twin Falls Water Power Company as aforesaid, by way of further assurance, and in accordance with the covenants in said Deed of Trust dated May 1, 1910.

Ninth. The tangible property described in and covered by said Supplemental Mortgage dated April 7, 1913, is situated in the Counties of Lincoln, Twin Falls, Elmore, Owyhee, Gooding, Minandoka, Ada and Cassia in the State of Idaho. Said Supplemental Mortgage, dated April 7, 1913, was duly recorded in the office of the Recorder of Lincoln County, State of Idaho, on the 3rd day of July, 1913, in Book 18 of Mortgages, page 285, and the fees and taxes thereon paid. Said Supplemental Mortgage, dated April 7th, 1913, was duly recorded in the office of the Recorder of Twin Falls County, State of Idaho, on the 15th day of July, 1913, in Book 23 of Mortgages, page 552, and the fees and taxes thereon paid. Said Supplemental Mortgage, dated April 7th, 1913, was duly recorded in the office of the Recorder of Owyhee County, State of Idaho, on the 25th day of September, 1913, in Book 10 of Mortgages, page 221, and the fees and taxes thereon paid. Said Supplemental Mortgage, dated April 7th, 1913, was duly recorded in the office of the Recorder of Elmore County, State of Idaho, on the 13th day of September, 1913, in Book 39 of Mortgages, page 279, and the fees and taxes thereon paid. Said Supplemental Mortgage, dated April 7th, 1913, was duly recorded in the office of the

Recorder of Gooding County, State of Idaho, on the 15th day of August, 1913, in Book 1 of Mortgages, page 123. Said Supplemental Mortgage, dated April 7th, 1913, was duly recorded in the office of the Recorder of Minandoka County, State of Idaho, on the 27th day of August, 1913, in Book 1 of Mortgages, page 269, and the fees and taxes thereon paid. Said Supplemental Mortgage, dated April 7th, 1913, was duly recorded in the office of the Recorder of Ada County, State of Idaho, on the 7th day of January, 1914, in Book 74 of Mortgages, page 396, and the fees and taxes thereon paid. Said Supplemental Mortgage, dated April 7th, 1913, was duly recorded in the office of the Recorder of Cassia County, State of Idaho, on the 28th day of July, 1913, in Book 6 of Mortgages, page 575, and the fees and taxes thereon paid.

Your orator duly accepted the trusts created by said Supplemental Mortgage dated April 7, 1913, and is advised and therefore avers that all of the bonds issued and outstanding under the said trust deed dated May 1, 1910, are entitled to the benefit of the security of said Supplemental Mortgage dated April 7, 1913, as well as of said Trust Deed dated May 1, 1910, and the above mentioned Supplemental Mortgage dated June 21, 1911.

Tenth. After the execution and delivery of said Deed of Trust, dated May 1, 1910, said Great Shoshone and Twin Falls Water Power Company duly made and executed bonds under said Deed of Trust to the aggregate principal amount of Two Million

Two Hundred and Thirty Thousand Dollars (\$2,230,000), all of which bonds were duly authenticated by the certificate of The Trust Company of America as Trustee or your orator as successor Trustee endorsed thereon, as provided in said bonds and Deed of Trust, and all of said bonds were duly certified, and all of said bonds as your orator is informed and believes, were duly issued by said Great Shoshone and Twin Falls Water Power Company for a valuable consideration and in accordance with law and with the provisions of said Deed of Trust; and all of the bonds so issued are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value, and your orator is advised and therefore avers that said bonds are now in all respects valid and outstanding obligations of the Great Shoshone and Twin Falls Water Power Company and are entitled to all the benefits of said Deed of Trust and of the above mentioned Supplemental Mortgages dated June 21, 1911, and April 7th, 1913, respectively.

Eleventh. Your orator further shows that on the second day of November, 1914 (the first day of said month being Sunday and a legal holiday), there fell due and became payable an instalment of interest upon the bonds issued under and secured by said Deed of Trust and said Supplemental Mortgages and now outstanding as aforesaid, which instalment amounted to the sum of Fifty-five Thousand Seven Hundred and Fifty Dollars (\$55,750). On said 2nd day of November, 1914, certain of the coupons ap-

pertaining to said bonds and maturing said day, evidencing the instalment of interest due and payable on said day, were duly presented for payment at the banking house of your orator in the City of New York, as successor by merger to The Trust Company of America where, by their terms, said coupons were payable, and payment was then and there duly demanded, and the surrender of said coupons duly tendered; but payment thereon was wholly refused and said Great Shoshone and Twin Falls Water Power Company wholly defaulted in the payment of said coupons and in the payment of the semi-annual instalment of interest due November 2, 1914, on all of the bonds secured by said Deed of Trust and Supplemental Mortgages and now outstanding, and has ever since wholly failed, omitted and refused to pay or cause to be paid said semi-annual instalment of interest or any part thereof and has wholly failed, omitted and refused to pay or cause to be paid the coupons maturing November 2, 1914, and duly presented for payment as aforesaid, or any of them or any part thereof; and said Great Shoshone and Twin Falls Water Power Company has therein and thereby wholly made default in the covenants and conditions of said Mortgage.

Twelfth. Your orator is informed and believes and therefore avers that on or about the 2nd day of November, 1914, the defendant Guy I. Towle filed his bill of complaint in this Court against the defendant Great Shoshone and Twin Falls Water Power Company, praying for the appointment of a receiver or

receivers for said Company and its property; that thereupon and on or about the 2nd day of November, 1914, this Court by an order made that day appointed the defendant William T. Wallace, Receiver of Great Shoshone and Twin Falls Water Power Company and of all of its property, including the property subject to the lien of said Deed of Trust dated May 1, 1910, and of said Supplemental Mortgages dated June 21, 1911, and April 7, 1913; and that said William T. Wallace duly qualified as such Receiver and entered upon the possession of said property and is now in possession of all of the property of said Great Shoshone and Twin Falls Water Power Company, including the property subject to the lien of said Deed of Trust dated May 1, 1910, and of said Supplemental Mortgages dated June 21, 1911, and April 7, 1913. Your orator further alleges that the said Receiver has wholly failed to pay said instalment of interest and said coupons of the said Great Shoshone and Twin Falls Water Power Company due November 2, 1914, and has wholly made default in respect thereto.

Thirteenth. Your orator further shows that in and by said Deed of Trust dated May 1, 1910, it is provided that upon the election of the holders of a majority in interest of the bonds thereby secured at any time outstanding, the Trustees thereunder or either of them may be removed from the Trusteeship thereunder upon notice to that effect to the Trustees and the Great Shoshone and Twin Falls Water Power Company given by an instrument or concurrent

instruments in writing signed by the holders of such an amount of bonds, with affidavits of ownership thereto annexed. Your orator is informed and believes and therefore avers that by virtue of and pursuant to such provisions of said Deed of Trust, the owners and holders of all of the outstanding bonds secured by said Deed of Trust did heretofore and in the month of February, 1915, give notice in writing to your orator and said James D. O'Neil and to said Great Shoshone and Twin Falls Water Power Company that they had removed and did thereby remove said James D. O'Neil as Trustee and from the Trusteeship under said Deed of Trust, which notice in writing your orator is informed and believes and therefore alleges was signed by the holders and owners of all the outstanding bonds issued under and secured by said Deed of Trust and to which there were annexed affidavits of the ownership of all of said bonds by the signers of said instruments in writing; and that thereupon said James D. O'Neil was removed as Trustee under said Deed of Trust and the mortgages supplemental thereto and from the Trusteeship thereunder, and ceased to be a Trustee thereunder. And your orator further avers and alleges that thereupon your orator became and now is the sole Trustee under said Deed of Trust dated May 1, 1910, and said Supplemental Mortgages dated June 21, 1911, and April 7, 1913, and became and now is vested with and should be entitled to exercise all the rights, powers, property, estates and trusts granted to or conferred jointly upon the two original

Trustees thereunder, as provided in the said Deed of Trust dated May 1, 1910, and especially in Section 1 of Article Thirteen thereof.

Fourteenth. Your orator further shows to the Court that it is provided in and by the terms of said Deed of Trust dated May 1, 1910, that the Trustees may, and shall upon the request of one-tenth in interest of the owners and holders of the bonds then outstanding under said Deed of Trust, commence and prosecute all such proceedings at law or in equity in addition to those specifically mentioned in said Deed of Trust, as they may be advised is necessary or proper to protect the mortgage security and the rights of the holders of the bonds issued thereunder. Your orator has been requested by persons owning all of the bonds issued and secured by said Deed of Trust dated May 1, 1910, and said Supplemental Mortgages dated June 21, 1911, and April 7, 1913, and now outstanding, to enforce their rights in the premises and to institute this present suit by the filing of this bill of complaint for the foreclosure of said Deed of Trust and Supplemental Mortgages on all of the property subject to them or either of them.

Fifteenth. Your orator further alleges that no proceedings at law or suits in equity have been taken or commenced by your orator save this suit, nor, as your orator is informed and believes, by any holder of any of the bonds secured by said Deed of Trust or Supplemental Mortgages or any of the coupons thereto pertaining, to enforce the payment of the sums covenanted to be paid by the Great Shoshone

and Twin Falls Water Power Company under the terms of said Deed of Trust or said bonds or coupons or otherwise to enforce their rights thereunder.

Sixteenth. Your orator is informed and believes, and therefore avers that at the time of the execution and delivery of said Deed of Trust, Exhibit "A", said Great Shoshone and Twin Falls Water Power Company was the owner of property of various kinds, which was referred to and generally described in and subjected to the lien of said Deed of Trust which was not specifically described therein; and also that since the date of the execution and delivery of said Deed of Trust dated May 1, 1910, certain other property, real, personal and mixed, and rights and interests (other than as specified and enumerated in said Supplemental Mortgages dated June 21, 1911, and April 7, 1913) have become subject to the lien of said Deed of Trust by reason of the acquisition thereof by said Great Shoshone and Twin Falls Water Power Company and under and pursuant to and by reason of the terms of said Deed of Trust. Your orator is not advised as to the exact character, description and extent of such other property, rights and interests as have become subject to said Deed of Trust, and therefore avers that for the proper protection and enforcement of the rights of your orator and of the holders of the bonds and coupons issued and outstanding under and secured by said Deed of Trust, it is necessary that Great Shoshone and Twin Falls Water Power Company and William T. Wallace as Receiver thereof as aforesaid, account to your ora-

tor in this suit for all the property, rights and interests of any and every kind owned or acquired by it or by him as such Receiver, and that the said property, rights and interests or so much thereof as are subject to said Deed of Trust or Supplemental Mortgages be so declared and decreed by this Court.

Seventeenth. By instrument dated June 15th, 1911, said The Trust Company of America and the said James D. O'Neil, as Trustees as aforesaid, released from the lien of said Deed of Trust, dated May 1st, 1910, the following described property situated in Lincoln County, State of Idaho, to-wit:

All that certain lot or piece of ground situate in Lot No. Two (2), Section Eleven (11), Township Seven (7) South, Range Thirteen (13) East of the Boise Meridian, bounded and described as follows:

Beginning at a point S. 27 degrees 45' W., 823.7 feet from the quarter section corner between Sections 2 and 11, T. 7 S., R. 13 E. B. M.

Thence N. 80 degrees 28' W., 949.5 feet; thence South 101.2 feet; thence S. 86 degrees 42' E. 937.9 feet to the point of beginning, comprising 1.08 acres, all in Lot No. 2, T. 7 S. R., 13 E. B. M.

Also a right of way for a road in Lincoln County, State of Idaho, the center line of said road being more particularly described as follows:

Commencing at a point which bears South 1° 23' West 1320.4 feet from the quarter corner between Sections 2 and 11, Township 7 South of Range 13 East of Boise Meridian; thence North

26° 24' West 263 feet to a point; thence North 28° 58' West 400 feet to a point; thence North 63° 47' West 36.9 feet to a point on the rim rock, which bears South 27° 37' West 810.7 feet from the quarter corner between Sections 2 and 11, Township 7 South of Range 13 East of Boise Meridian. Being the same right of way which Russell N. Ingraham and wife, by agreement dated August 18th, 1909, and recorded in the Recorder's office of Lincoln County, in Book 7 of Deeds at page 427, granted and conveyed unto William S. Kuhn and which the said William S. Kuhn granted and conveyed unto the Great Shoshone and Twin Falls Water Power Company.

Together with all and singular, the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

The property heretofore in this paragraph described is the only property which has been released from the lien of said Deed of Trust, and all other property of the kind or nature described in said Deed of Trust and owned by Great Shoshone and Twin Falls Water Power Company at the time of the execution and delivery of said Deed of Trust or acquired by said Great Shoshone and Twin Falls Water Power Company since that time is subjected to the lien of said Deed of Trust and all of the \$2,230,000 in principal amount of bonds issued and outstanding, as aforesaid, are entitled to the benefit of such lien.

Eighteenth. The amount in controversy herein exceeds the sum of Five Thousand Dollars (\$5,000), exclusive of interest and costs.

Nineteenth. Your orator further avers that upon application by your orator by petition filed the 31st day of March, 1915, this Court has granted leave to your orator, by order dated the 31st day of March, 1915, to file this bill of complaint and to make said William T. Wallace as Receiver as aforesaid a party defendant herein.

Twentieth. Your orator is further informed and believes and therefore alleges that the defendant Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, claims some interest in the property herein referred to by virtue of a judgment recovered in the United States Court for the District of Idaho, which interest however is subject to the interest of your orator therein as trustee under the said Deed of Trust and Supplemental Mortgages.

In consideration whereof and for as much as your orator is remediless in the premises according to the rules of the common law and can have adequate relief only in a Court of Equity where matters of this nature are properly cognizable and relievable, your orator prays this Honorable Court:

(1) That the said defendants herein named may separately and severally make answer unto all and singular the matters hereinbefore stated and charged and that as fully in every respect as if the same were here again repeated and they thereunto particularly

interrogated, but not under oath, their answers under oath being hereby expressly waived.

(2) That an account may be taken of all the property, rights and interests subject to the lien of said Deed of Trust, dated May 1, 1910 (Exhibit "A") or to said Supplemental Mortgage dated June 21, 1911 (Exhibit "B"), or to said Supplemental Mortgage dated April 7, 1913 (Exhibit "C"), and that said Deed of Trust and said Supplemental Mortgages may be decreed and established as a valid and existing lien upon all of said property superior to the lien or interest of any of the defendants herein.

(3) That the defendant Great Shoshone and Twin Falls Water Power Company may be decreed to pay within a short date, to be fixed by the Court, to the holders of the bonds and coupons secured by said Deed of Trust dated May 1, 1910, or to your orator as Trustee for such holders the amount of defaulted interest thereon and all moneys now due or to become due and payable under and by virtue of said Deed of Trust or of said bonds and coupons, together with a sum sufficient to pay the costs, expenses and allowances of this suit.

That in default thereof, all and singular the said property, rights and interests conveyed, transferred, mortgaged or pledged by and described or referred to in said Deed of Trust, dated May 1, 1910, or said Supplemental Mortgage dated June 21, 1911, or said Supplemental Mortgage dated April 7, 1913, and all other property, rights and interests declared to be subject to the lien thereof may be sold under a decree

of this Honorable Court, and that the defendant Great Shoshone and Twin Falls Water Power Company and all persons claiming under or through it and all the other defendants herein may be forever barred and foreclosed of and from any equity or redemption of or claim of and in such property, rights and interests. That the proceeds of such sale may be brought into this Court to be administered by it as may be equitable and proper; that an account may be taken of the amount due on said bonds and coupons and that, in case of the insufficiency of such proceeds or of such portions thereof as may be applicable thereto to pay in full the amount so found to be due, with costs, expenses and allowances, and that a judgment may be rendered in this cause for such deficiency against the defendant Great Shoshone and Twin Falls Water Power Company.

(4) That pending this suit a Receiver or Receivers be appointed with the usual powers and duties of Receivers in like cases, of all the property, rights and interests conveyed, transferred, mortgaged or pledged in and by said Deed of Trust, dated May 1, 1910, or said Supplemental Mortgage dated June 21, 1911, or said Supplemental Mortgage dated April 7, 1913, and of all the rents, revenues, issues and profits thereof, or that the present receivership in the hereinbefore mentioned suit pending in this Court between Guy I. Towle, Complainant, and Great Shoshone and Twin Falls Water Power Company be extended to cover said property; and that such directions may be made with respect to such receivership

as may be equitable and proper; and that pending this suit a writ of injunction may be issued out of and under the seal of this Honorable Court, directing, commanding, enjoining and restraining the said defendant Great Shoshone and Twin Falls Water Power Company, its officers, directors and agents and all other persons whomsoever from interfering with, transferring, selling, attaching, levying upon, encumbering or otherwise disposing of any of the property conveyed, transferred, mortgaged or pledged in and by said Deed of Trust, dated May 1, 1910, or said Supplemental Mortgage dated June 21, 1911, or said Supplemental Mortgage dated April 7, 1913, or from in any way interfering with the possession or control of the property under the control of said Receiver or Receivers.

(5) That your orator may have such other and further relief in the premises as the nature and circumstances of the case may require and as to this Honorable Court may seem just and equitable.

May it please your Honors to grant unto your orator a writ or writs of subpœna to be directed to the said defendants Great Shoshone and Twin Falls Water Power Company, William T. Wallace as Receiver of Great Shoshone and Twin Falls Water Power Company, Guy I. Towle and Carl J. Hahn as administrator of the estate of Harry M. King, deceased, commanding them and each of them, at a certain time and under a certain penalty therein to be named, to be and appear before your Honors in this Honorable Court, then and there severally to

answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to stand to, abide by and perform such further orders and decrees as to your Honors may seem meet.

And your orator will ever pray, etc.

THE EQUITABLE TRUST COMPANY OF NEW
YORK, By Lyman Rhoades, Vice-President,
Complainant.

MURRAY, PRENTICE & HOWLAND,
SULLIVAN & SULLIVAN,
Solicitors for Complainant.

CHARLES P. HOWLAND,
W. E. SULLIVAN,
L. L. SULLIVAN,
Of Counsel.

(Duly verified.)

EXHIBIT A.

DEED OF TRUST
GREAT SHOSHONE AND TWIN FALLS
WATER POWER COMPANY
TO
THE TRUST COMPANY OF AMERICA
AND
JAMES D. O'NEIL
TRUSTEES
May 1st, 1910.
\$10,000,000.

THIS INDENTURE

Made and entered into this first day of May in the year of our Lord one thousand nine hundred and ten

(and intended to bear said date, although actually executed and delivered on the 21st day of July, 1910) by and between the *Great Shoshone and Twin Falls Water Power Company*, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, hereinafter called the "Company", party of the first part, and *The Trust Company of America*, of the City of New York, State of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, hereinafter called the "Trust Company", and James D. O'Neil, of the City of Pittsburgh, County of Allegheny and State of Pennsylvania, parties of the second part, both hereinafter called the "Trustees":

Whereas, the Company has full power and authority under its charter and the laws of the State of Delaware and the laws of the State of Idaho to borrow money for the purposes herein provided and to make, issue and dispose of the bonds hereinafter described and to secure the payment of the principal sums of and interest upon all of said bonds by mortgage or deed of trust as hereinafter provided; and,

Whereas, the Company has fully complied with the laws of the State of Idaho concerning foreign corporations and had and has authority to acquire the properties hereby conveyed and has all the rights, powers and privileges under the laws of the State of Idaho of a like domestic corporation therein; and,

Whereas, it is necessary for the Company to borrow money for its general purposes and business, and

it is and will be necessary for it, from time to time, so to do and to borrow money for the purposes for which the bonds authorized to be issued hereunder are authorized to be certified and delivered; and,

Whereas, the stockholders of the Company have duly consented to the issuance, from time to time, of the bonds authorized to be issued hereunder, and the execution of a mortgage or deed of trust to the Trustees hereunder, upon all or any part of the property of the Company, for the purpose of securing the payment of the principal and interest of said bonds; and,

Whereas, the Board of Directors of the Company, at a meeting duly held, has authorized the issuance and delivery of the bonds hereinafter described, upon the terms herein provided, and that for the purpose of securing the same, with interest thereon, the Company, it was resolved by said Board of Directors, should execute unto the Trustees herein named a mortgage or deed of trust upon the properties herein described and hereby conveyed, and that said bonds might, from time to time, be issued to the aggregate amount of Ten Million (\$10,000,000) Dollars, at par, in their principal sums; and,

Whereas, it was also resolved by said Board of Directors that said bonds should and might be issued in the denominations of Twenty-five Thousand (\$25,000) Dollars (in the form of registered bonds), and One Thousand (\$1,000) Dollars and Five Hundred (\$500) Dollars (in the form of coupon bonds, subject

to registration as to the payment of their principal sums) and that the form of bonds of the denomination of One Thousand (\$1,000) Dollars, with the coupons thereto attached and the Trustee's certificate to be endorsed thereon, should be substantially in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,

STATE OF DELAWARE.

No.....\$1,000. No.....\$1,000.

GREAT SHOSHONE AND TWIN FALLS

WATER POWER COMPANY

FIRST MORTGAGE FIVE PER CENT.

GOLD BOND

For value received, the Great Shoshone and Twin Falls Water Power Company, a corporation organized and existing under the laws of the State of Delaware, promises to pay to the bearer of this bond, or in case this bond be registered, to the registered holder hereof One Thousand (\$1,000) Dollars in gold coin, lawful money of the United States of America, of the present standard of weight and fineness, on the first day of May in the year Nineteen Hundred and Fifty (1950) at the banking house of The Trust Company of America in the City of New York, and to pay interest thereon semi-annually in like gold coin at the rate of five per centum (5%) per annum, on the first day of May and the first day of November in each year from May 1st, 1910, until said principal sum is paid, upon presentation and surrender of the coupons hereto attached at said banking house of The

Trust Company of America in the City of New York as they severally become due and payable.

Both principal and interest of this bond are payable without deduction for any United States, State, County, Municipal or other tax or taxes which the Great Shoshone and Twin Falls Water Power Company may be required to pay, deduct or retain therefrom under or by reason of any present or future law. and the Great Shoshone and Twin Falls Water Power Company hereby agrees to pay all such tax or taxes so required to be paid, deducted or retained by it.

This bond is one of an issue of coupon bonds and registered bonds of said Great Shoshone and Twin Falls Water Power Company of like date, bearing interest at the rate of five per centum (5%) per annum, and issued or to be issued to the aggregate amount, in their principal sums, of Ten Million (\$10,000,000) Dollars, under the provisions of and equally secured by a Mortgage or Deed of Trust of the obligor herein, bearing even date herewith, executed and delivered by it to said The Trust Company of America, a corporation duly organized and existing under the laws of the State of New York, and James D. O'Neil, of Pittsburgh, Pennsylvania, as Trustees, covering all the properties, rights and franchises of the Great Shoshone and Twin Falls Water Power Company set forth in said Mortgage or Deed of Trust, to which reference is hereby made for a description of the properties, rights and franchises mortgaged, and the nature and extent of the

security, the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are issued and secured.

If default shall be made in the payment of any installment of interest upon this bond, or in the performance of certain covenants and agreements in said Mortgage or Deed of Trust, then the principal of this bond may be made due and payable on the conditions and in the manner and at the times provided in said Mortgage or Deed of Trust.

This bond shall pass by delivery unless registered in the owner's name on the books of the Great Shoshone and Twin Falls Water Power Company at the office of its Registrar of bonds in the City of Pittsburgh, Pennsylvania, in the manner provided in said Mortgage or Deed of Trust, such registry being noted on the bond by said Registrar, after which no transfer thereof shall be valid unless made on said books by the registered owner or his attorney, authorized in writing, and similarly noted on the bond; but the same may be discharged from registry by being in like manner transferred to bearer, after which it shall be transferable by delivery as before. The registration of this bond shall not restrain or affect the negotiability of the coupons belonging hereto by delivery merely.

This bond shall continue subject to successive registrations and transfers to bearer, as aforesaid, at the option of the owner.

This bond is subject to redemption as provided in

said Deed of Trust at any interest paying period by payment of the unpaid accrued interest hereon and the principal hereof, together with a premium of five per centum (5%) upon such principal sum.

No recourse shall be had for the payment of the principal of or interest upon this bond against any stockholder, director or officer of the Great Shoshone and Twin Falls Water Power Company, whether by any statute or by the enforcement of any assessment or otherwise howsoever.

This bond shall not be valid or obligatory for any purpose until it shall have been authenticated by the signature of The Trust Company of America, Trustee, or its successor in the trusts created by said Deed of Trust, to the certificate endorsed hereon.

It is further hereby recited and covenanted by said Great Shoshone and Twin Falls Water Power Company to and with the holder of this bond, that all conditions precedent, acts, steps and things necessary to the legal issuance of this bond have been fully done and performed, and that this bond is a legal and valid obligation of said Great Shoshone and Twin Falls Water Power Company.

In Witness Whereof, the Great Shoshone and Twin Falls Water Power Company has caused this bond to be signed by its President or Vice President, and its corporate seal to be hereto affixed, attested by its Secretary or Assistant Secretary, and the interest coupons hereto attached to be executed with the engraved or lithographed fac-simile of the signature of

its Treasurer, and this bond to be dated the first day of May, A. D. 1910.

GREAT SHOSHONE AND TWIN FALLS WATER
POWER COMPANY, By.....
President.

Attest:

.....

Secretary.

FORM OF COUPON

No..... \$25.00

The Great Shoshone and Twin Falls Water Power Company, a Delaware corporation, will pay to the bearer on the first day of....., A. D. 19..., at the banking house of The Trust Company of America, in the City of New York, *Twenty-five Dollars*, in gold coin, lawful money of the United States of America, of the present standard of weight and fineness, without deduction for taxes, as specified in its First Mortgage Five Per Cent. Gold Bond, dated May 1st, 1910, No....., being the six months' interest then due on said bond.

.....

Treasurer.

TRUSTEE'S CERTIFICATE.

This is to certify that the within bond is one of the bonds issued under and described in the within mentioned Mortgage or Deed of Trust to the undersigned and James D. O'Neil, as Trustees, dated May 1st, 1910.

THE TRUST COMPANY OF AMERICA, Trustee.

By.....

Vice President.

Date of Registry	In Whose Name Registered	Registrar
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.....
.....
.....

Said bonds of the denomination of Five Hundred (\$500) Dollars each, with the coupon thereto attached and the Trustee's certificate to appear thereon, it was resolved, should be like the foregoing except as to the amounts of their principal sums and the amounts of their coupons, the coupons attached thereto being in the sum of Twelve and 50/100 (\$12.50) Dollars each.

Said bonds of the denomination of Twenty-five Thousand (\$25,000) Dollars each, and the Trustee's certificate to be endorsed thereon, it was also provided, should be substantially in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,
STATE OF DELAWARE.

No..... \$25.00

GREAT SHOSHONE AND TWIN FALLS
WATER POWER COMPANY.

FIRST MORTGAGE FIVE PER CENT.

GOLD BOND.

For value received, the Great Shoshone and Twin Falls Water Power Company, a corporation organized and existing under the laws of the State of Delaware, promises to pay to.....
or registered assigns, Twenty-five Thousand (\$25,-

000) Dollars, in gold coin, lawful money of the United States of America, of the present standard of weight and fineness, on the first day of May, in the year Nineteen Hundred and Fifty (1950) at the banking house of The Trust Company of America in the City of New York, and to pay interest thereon semi-annually in like gold coin at said banking house at the rate of five per centum (5%) per annum, on the first day of May and the first day of November in each year from May 1st, 1910, until said principal sum is paid.

Both principal and interest of this bond are payable without deduction for any United States, State, County, Municipal or other tax or taxes which the Great Shoshone and Twin Falls Water Power Company may be required to pay, deduct or retain therefrom under or by reason of any present or future law, and the Great Shoshone and Twin Falls Water Power Company hereby agrees to pay all such tax or taxes so required to be paid, deducted or retained by it.

This bond is one of an issue of coupon bonds and registered bonds of said Great Shoshone and Twin Falls Water Power Company of like date, bearing interest at the rate of five per centum (5%) per annum, and issued or to be issued to the aggregate amount, in their principal sums, of Ten Million (\$10,000,000) Dollars, under the provisions of and equally secured by a Mortgage or Deed of Trust of the obligor herein, bearing even date herewith, executed and delivered by it to said The Trust Company of America, a cor-

poration duly organized and existing under the laws of the State of New York, and James D. O'Neil, of Pittsburgh, Pennsylvania, as Trustees, covering all the properties, rights and franchises of the Great Shoshone and Twin Falls Water Power Company set forth in said Mortgage or Deed of Trust, to which reference is hereby made for a description of the properties, rights and franchises mortgaged, and the nature and extent of the security, the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are issued and secured.

If default shall be made in the payment of any installment of interest upon this bond, or in the performance of certain covenants and agreements in said Mortgage or Deed of Trust, then the principal of this bond may be made due and payable on the conditions and in the manner and at the times provided in said Mortgage or Deed of Trust.

This bond is subject to redemption as provided in said Deed of Trust at any interest paying period by payment of the unpaid accrued interest hereon and the principal hereof, together with a premium of five per centum (5%) upon such principal sum.

No recourse shall be had for the payment of the principal of or interest upon this bond against any stockholder, director or officer of the Great Shoshone and Twin Falls Water Power Company, whether by any statute or by the enforcement of any assessment or otherwise howsoever.

This bond, as provided in said Deed of Trust, may be exchanged for an equal aggregate amount in their principal sums of the coupon bonds therein described, but which may be registered as to the payment of their principal sums.

This bond shall not be valid or obligatory for any purpose until it shall have been authenticated by the signature of The Trust Company of America, Trustee, or its successor in the trusts created by said Deed of Trust, to the certificate endorsed hereon.

It is further hereby recited and covenanted by said Great Shoshone and Twin Falls Water Power Company to and with the holder of this bond, that all conditions precedent, acts, steps and things necessary to the legal issuance of this bond have been fully done and performed, and that this bond is a legal and valid obligation of said Great Shoshone and Twin Falls Water Power Company.

In witness whereof, the Great Shoshone and Twin Falls Water Power Company has caused this bond to be signed by its President or Vice President, and its corporate seal to be hereto affixed, attested by its Secretary or Assistant Secretary, and this bond to be dated the first day of May, A. D. 1910.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY.

By.....

President.

Attest:

.....

Secretary.

TRUSTEE'S CERTIFICATE.

This is to certify that the within bond is one of the bonds issued under and described in the within mentioned Mortgage or Deed of Trust to the undersigned and James D. O'Neil, as Trustees, dated May 1st, 1910.

THE TRUST COMPANY OF AMERICA, Trustee.

By.....
Vice President.

Said bonds of the denomination of One Thousand (\$1,000) Dollars each and Five Hundred (\$500) Dollars each, it was also resolved, should be issued as coupon bonds and that the same should be subject to registration as to the payment of their principal sums, as hereinafter provided, and the same are hereinafter referred to as "coupon" bonds, where any distinction is desired to be made between such bonds and the registered bonds provided to be issued hereunder.

Said bonds of the denomination of One Thousand (\$1,000) Dollars each are numbered, or shall be numbered, consecutively from M-1 upwards; and said bonds of the denomination of Five Hundred (\$500) Dollars each are numbered, or shall be numbered, consecutively from D-1 upwards.

Said bonds of the denomination of Twenty-five Thousand (\$25,000) Dollars each are numbered, or shall be numbered, consecutively from 1 (one) upwards, and the same, it was also resolved, should be issued only as registered bonds, without coupons at-

tached thereto, and the bonds of said denomination are hereinafter referred to as "registered" bonds where any distinction is desired to be made between the same and the coupon bonds provided to be issued hereunder; and,

Whereas, it was also resolved that such registered bonds, or any of them, should be exchangeable under the terms of this Deed of Trust, as hereinafter provided, for an equal aggregate amount, at par, in their principal sums of the coupon bonds authorized to be issued hereunder; and,

Whereas, it was also resolved that the bonds of said several denominations might, from time to time, be issued agreeably to the terms and provisions of this indenture in such lots or amounts of any one or more of said denominations of bonds as the Company might, from time to time, request, to the aggregate amount, at par, in their principal sums, of Ten Million (\$10,000,000) Dollars, and that any or all of said bonds should be subject to redemption upon the terms therein and hereinafter provided; and,

Whereas, it was also resolved that coupons should be attached to the coupon bonds to be issued hereunder and that such coupons should be in proper amounts for the several semi-annual installments of interest to accrue upon the bonds to which the same belong to the date of maturity of such bonds, and that the coupons attached to any bond should refer to the number of the bond to which such coupons belong, and that said coupons should be signed with the en-

graved or lithographed fac-simile of the signature of the present or any future Treasurer of the Company; and,

Whereas, it was also resolved that all or any part of the bonds to be issued hereunder should be signed in the name of the Company by the present or any future President or Vice-President of the Company and should have affixed thereto the corporate seal of the Company, attested by the signature of the present or any future Secretary or Assistant Secretary of the Company; and,

Whereas, the said The Trust Company of America is authorized by its charter and the laws of the State of New York to receive and execute the trusts created by this indenture, and said Trust Company and the said James D. O'Neil have agreed to accept and execute the same:

Now, therefore, this indenture witnesseth, That the said Great Shoshone and Twin Falls Water Power Company, party of the first part hereto, for and in consideration of the promises and the sum of One (\$1.00) Dollar in hand paid to it by the parties of the second part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in order to secure the due and punctual payment of the principal and interest of all of the bonds issued and at any time outstanding hereunder hath granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over and by these presents doth grant, bargain, sell, alien, remise, release, convey, confirm,

assign, transfer and set over unto the said The Trust Company of America and James D. O'Neil, as Trustees, and their successor or successors in the trusts hereby created, all and singular the property of the Company described as follows, to-wit:

(There is here omitted a specific description of certain property included in the amendments to the bill of complaint.)

Parcel Five. And, generally, all other rights and property of the Company, whether now owned or hereafter acquired, and whether real, personal or mixed, in or near the Snake River in the State of Idaho, and used, or intended so to be, or designed to be used for, or in connection with the development of hydro-electric power and the transmission, conversion and distribution thereof, including all of its water permits or appropriations for or of the waters of Snake River, or tributaries thereof, in the State of Idaho, and all rights and interests of the Company now owned or hereafter acquired in any such permits or appropriations, together with all of its power plants, dams, reservoirs, flumes, canals, tunnels, raceways, controlling works, reservoirs, and other appurtenances thereto, and all rights and interests of the Company, whether now owned or hereafter acquired, in or to any of the same, including water frontage or power sites, and all its machinery, lines, buildings or other improvements, weirs, water wheels, generators, dynamos, switch boards, transformers, electrical engines or other machinery and appliances connected or to be connected with any of

the property or properties herein described or used in connection with any of its hydro-electric power plant or plants, stations or sub-stations or electric light plant or plants, and all other real estate, whether now owned or hereafter acquired and used, or to be used, in connection with any of the foregoing properties of the Company, and including all rights of way, easements and appurtenances, whether now owned or hereafter acquired, connected with or appurtenant to any of the property hereby conveyed, or intended so to be, and all real estate hereafter acquired by the Company for power houses or developing station purposes or for sub-stations, together with all improvements thereon, or for offices, stores or dwelling houses for the use of the Company or its employees, wheresoever the same may be located, together with all improvements thereon; and all its tools, implements, equipments, supplies, materials, and outfits; and all its transmission and electric distributing lines, poles, wires, cables, conduits, subways, manholes, fixtures, fittings or other appurtenances, whether now owned or hereafter acquired or constructed by the Company for use in connection with its business, or extending from or connected with any such power plant or plants owned now or hereafter by the Company, wheresoever the same may be located, and whether now owned or hereafter acquired or constructed by it, and wheresoever any such properties may be located, expressly including herein all such properties of the Company in the Counties of Twin Falls and

Lincoln, State of Idaho, and in the Towns of Twin Falls, Kimberly, Filer, Buhl, Hollister and Hansen, in the County of Twin Falls, and in the Towns of Jerome, Wendell, Gooding and Hagerman, in the County of Lincoln, State of Idaho, and all and sundry its State, County or Municipal franchises, permits or licenses for the construction or operation of any part of its system, whether the same are now owned or shall hereafter be acquired, and all its rights, howsoever acquired, in the streets of any municipality or municipalities in which the Company is now or hereafter may be engaged in the furnishing of light or power, and all its rights, whether now owned or hereafter acquired, in, over and under all public roads, streets or highways, for the transmission and distribution of electric power for any purpose whatsoever; and all the tolls, incomes, and revenues of the Company to be derived from any of the foregoing property hereby conveyed or intended so to be.

Together with all and singular the buildings, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversions, remainders, rents, issues and profits thereof, and, also, all the estate, right, title and interest, property, possession, claim and demand whatsoever, as well in law as in equity, of said Great Shoshone and Twin Falls Water Power Company, of, in and to the same and each and every part and parcel thereof, with the appurtenances, and also all improvements.

To have and to hold all and singular said plants, works and other property, and rights, privileges and franchises hereby conveyed or intended so to be, together with all and singular the reversions, remainders, rents, revenues, incomes, issues and profits thereof and privileges and appurtenances now or hereafter belonging or in anywise appertaining thereto, unto the Trustees and their successors and assigns, in fee simple, forever.

In trust nevertheless, and upon the trusts and under the provisions hereinafter expressed concerning the same, for the equal and *pro rata* benefit of all holders of bonds duly issued under this mortgage, and to secure the payment of the principal and interest of all such bonds according to their terms and the terms of this mortgage, without preference or priority of one bond over another by reason of priority in time of issuance or negotiation thereof or otherwise, and for the uses and purposes hereinafter expressed; *Provided, however*, that if the Company shall pay the principal and interest of all of said bonds according to their terms and the terms of this mortgage, and the reasonable compensation and lawful charges of the Trustees, all the estate, title and interest of the Trustees in and to all the property subject thereto, and all the liens thereon, by reason of this mortgage, shall thereupon cease and determine; and provided further, that until default shall be made by the Company in the payment of the principal of or interest upon any of said bonds hereby secured, or until default shall be made in respect of

some act or thing, obligation or agreement herein required to be done, performed or kept by it, and at all times while there shall not exist or continue any such default, the Company shall be permitted, subject to the conditions herein provided, to possess, operate, use and enjoy the said mortgaged property, and the appurtenances, and the said rights, privileges and franchises, and to take and use the incomes, revenues, rents, issues and profits thereof, and to enjoy the incomes arising from the property hereby pledged or to be pledged hereunder or subject to the lien hereof, and to have, exercise and enjoy all the rights, powers, properties and estates hereunder or hereby reserved to the Company, the party of the first part hereto (excepting, nevertheless, that at all times all certificates of stock for the shares of the capital stock in each and every corporation at any time subject hereto, and all bonds and other obligations of each and every sub-company or other corporation at any time subject hereto and all other securities and trust funds shall remain in possession of the Trust Company, except as hereinafter otherwise provided) as if this mortgage had not been made; and provided further, that said mortgaged property and franchises and all other property at any time subject hereto shall be held by the Trustees and their successors upon the trusts and for the uses and purposes herein recited or contained, and the said bonds, together with the coupons thereto belonging, shall be issued by the Company and held by the several owners thereof, and said mortgaged property and franchises and all other

property at any time subject hereto shall be held by the Trustees hereunder and their successors, upon the additional terms and under and upon and subject to the further several and respective rights, reservations, obligations, agreements, covenants and requirements herein set out or contained, that is to say:

(There are here omitted certain provisions relative to covenants, certification, registration and exchange of bonds, sub-companies, and management of collateral and pledged bonds.)

ARTICLE SEVEN.

REMEDIES UPON DEFAULT.

SECTION 1. In case the Company shall make any default (1) in the payment of any installment of interest upon any of the bonds issued hereunder and secured hereby, and any such default shall continue for the period of six months after the payment of such installment of interest shall have become due and been demanded, or (2) in the due performance or observance of any other covenant or condition herein contained and required to be performed or observed by the Company and any such last mentioned default shall continue for the period of sixty days after notice thereof shall have been given to the Company by the Trustees or by the holders of one-fifth in interest of the bonds issued and then outstanding hereunder, specifying wherein such default consists, then and in either and any and every such case the Trustees hereunder may in their discretion, and shall, upon the request of one-fifth in interest of the owners and holders of the bonds issued and then outstanding here-

under, by notice in writing delivered to the Company, declare the principal sums of all the bonds hereby secured to be immediately due and payable and the same shall thereupon become and be immediately due and payable; *Provided, however*, that in each and any and every such case the owners and holders of a majority in interest of the bonds issued and outstanding hereunder may at any time after any such default or any such declaration accelerating the maturity of the principal sums of all the bonds hereby secured, waive any such default upon such terms and conditions as such majority may deem for the best interest of the owners and holders of the bonds issued hereunder and hereby secured and revoke and annul any such declaration accelerating the maturity of the principal sums of the bonds hereby secured, and thereupon the principal sums of all the bonds then outstanding hereunder shall immediately cease to be due and payable; *Provided always*, and it is hereby declared that no such action of the bondholders in waiving any default or revoking or annulling any declaration accelerating the maturity of the bonds issued and outstanding hereunder shall be taken to extend or apply to or affect any subsequent default or to impair any rights resulting therefrom.

SECTION 2. In case the Company shall make any default (1) in the payment of any installment of interest upon any of the bonds issued hereunder and secured hereby and any such default shall continue for the period of six months after the payment of such installment of interest shall have become due

and been demanded, or (2) in the due performance or observance of any other covenant or condition herein contained and required to be performed or observed by the Company, and any such last mentioned default shall continue for the period of sixty days after notice thereof shall have been given to the Company by the Trustees or by the holders of one-fifth in interest of the bonds issued and then outstanding hereunder, specifying wherein such default consists, or (3) in the payment of the principal sums of any of said bonds when the same shall become or be declared due and payable, then the Trustees hereunder may, in their discretion, and shall, upon the request of the holders and owners of one-fifth in interest of the bonds issued and then outstanding hereunder and upon indemnification against all costs, expenses and liabilities to be by the Trustees incurred in such behalf, enter into and upon all and singular the said property, rights and franchises then covered by this mortgage and each and every part thereof, and exclude wholly therefrom the Company and its agents, who shall forthwith surrender the same to the Trustees, to have, hold, manage, operate, control and use the same, either personally or by their superintendents, managers, receivers, agents, servants, or attorneys, and conduct the business thereof, and exercise the franchises pertaining thereto; to make, from time to time, at the expense of the trust estate, all repairs and replacements and such useful alterations, additions and improvements thereto as may seem to them necessary or judicious, and to collect

and receive all incomes, including dividends upon stocks and interest upon bonds or other securities then subject to the lien hereof, and rents, issues and profits of the same and of every part thereof, and to exercise in their discretion the voting power of the stocks then pledged hereunder, either personally or by their attorneys or proxies, said Trustees under the circumstances aforesaid being hereby constituted as the attorneys of the Company for that purpose; and after deducting the expenses of operating said property and conducting the business thereof, and of all repairs, replacements, alterations, additions and improvements as aforesaid, and all payments which shall be made for taxes or assessments, if any, prior to the lien of this mortgage upon the said property, or any part thereof, as well as a just and reasonable compensation for their own services, and for the services of all agents, clerks or other employes by them properly engaged or employed, to apply the money arising as aforesaid to the payment of the interest in arrears on the bonds secured hereby, in the order in which such interest shall have become due and payable, ratably to the persons entitled to such interest, and after paying all such interest which shall have become due and payable, to apply the said moneys to the satisfaction of the principal of the aforesaid bonds which may be at that time due and unpaid, if the principal shall have become due and payable as herein provided, ratably without discrimination or preference; *Provided*, that if after such entry, all the arrears of interest shall be fully

discharged, and if the Company shall have made good each and every other covenant, obligation or condition herein required to be kept, performed or observed by it, and in which it may have made default, or shall pay unto the Trust Company to be held upon the trusts hereof, an amount of money sufficient to pay all loss or damage resulting therefrom, or shall otherwise make good or repair all loss or damage so resulting, then each and every default shall be deemed to be waived and discharged; and the Trustees shall restore said property to the Company, to possess, manage, operate and enjoy the same, in like manner, as before such entry, but without prejudice to the right of the Trustees to enter, as herein provided, for any subsequent default.

SECTION 3. In case the Company shall make any default (1) in the payment of any installment of interest upon any of the bonds issued hereunder and hereby secured, and any such default shall continue for the period of six months after the payment of such installment of interest shall have become due and been demanded, or (2) in the due performance or observance of any other covenant or condition herein contained and required to be performed or observed by the Company and any such last mentioned default shall continue for the period of sixty days after notice thereof shall have been given to the Company by the Trustees or by the holders of one-fifth in interest of the bonds issued and then outstanding hereunder, specifying wherein such default consists, or (3) in the payment of the principal sums of any

of said prior bonds when the same shall become, or be declared due and payable, then and in either and in any and every such case it shall be lawful for the Trustees, and on requisition in writing signed by the holders of not less than one-fifth in interest of the owners of the bonds issued and outstanding hereunder, and upon adequate indemnity against all costs, expenses and liabilities to be by them incurred, it shall be the duty of the Trustees, to proceed to enforce the rights of the holders of the bonds issued and outstanding hereunder either by sale of the property hereby pledged, if the principal sums of the bonds hereby secured shall have become or shall have been declared due and payable as herein provided, or by any other appropriate proceeding in any proper Court by way of remedy as the Trustees, being advised by counsel learned in the law, shall deem most effectual to enforce such rights or as such requisition may specify, subject, nevertheless, to the power in all cases in this Section provided, hereby declared, of a majority in interest of the holders and owners of the bonds issued and then outstanding hereunder in writing to waive any such default upon such terms and conditions as such majority may deem for the best interests of the owners and holders of the bonds issued hereunder and then secured hereby; *Provided, always*, and it is hereby declared that no such action of the bondholders in waiving any default shall be taken to extend, or apply to or effect any subsequent default or to impair any rights of the Trustees or of the bondholders resulting therefrom. The right to

institute judicial proceedings for the enforcement of any rights hereby created is vested exclusively in the Trustees, provided the Trustees shall institute such proceedings within a reasonable time after the making of such requisition and offer of such indemnity as hereinbefore provided.

SECTION 7. The Company will not, at any time, insist upon or plead, or in any manner whatever claim, or take the benefit or advantage of, any stay or extension law now or at any time hereafter in force, nor will it claim, take or insist upon any benefit or advantage from any law now or hereafter in force providing for valuation or appraisement of the mortgaged property, or any part thereof, prior to any sale or sales thereof to be made pursuant to any provision herein contained, or to the decree, judgment or order of any Court of competent jurisdiction; nor after any such sale or sales will it claim or exercise any right under any statute enacted by any state or otherwise to redeem the property so sold or any part thereof; and it hereby expressly waives all benefit and advantage of every such law or laws; and it covenants that it will not hinder or impede the execution of any power herein granted and delegated to the Trustees but that it will suffer and permit the execution of every such power, as though no such law or laws had been made or enacted.

SECTION 8. The Trustees may and shall, upon request of one-tenth in interest of the owners and holders of the bonds then outstanding hereunder, and indemnification to them, as herein provided, commence

and prosecute all such other and further proceedings in law or equity as they may be advised is necessary or proper to protect the mortgage security and the rights of the holders of the bonds issued hereunder, but all such proceedings so commenced by the Trustees shall be subject to the control of a majority in interest of the owners and holders of the bonds issued and outstanding hereunder.

SECTION 9. No delay or omission of the Trustees or of any holder or any of the bonds secured hereby to exercise any rights or power accruing from any default then continuing hereunder shall impair any such right or power or shall be construed as a waiver of any such default or acquiescence therein except as herein expressly provided to the contrary.

No person purchasing bonds or dealing with the Trustees shall be bound to inquire or ascertain whether any default has been made or any required request or notice has been made or given, or whether any event has happened upon which any of the powers herein contained may be exercised by the Trustees, or otherwise as to the propriety or regularity of any sale or any exercise of any of said powers.

SECTION 10. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the Trustees, or to the holders of the bonds hereby secured, is intended to be or shall be exclusive of any other remedy or remedies; but each and every such remedy shall be cumulative and shall be in addition to every other remedy given hereunder, or now or hereafter existing at law or in equity or by stat-

ute; but no action at law shall be instituted against the Company by the Trustees or either of them or any bondholder to enforce the contractual liability of the Company to pay the principal sum of any bonds until the property hereby conveyed shall have been exhausted by pursuit of the remedies herein provided.

SECTION 11. If the Company shall at any time before the sale of the property, rights, privileges and franchises hereby conveyed and before the first day of May, 1950, pay off and discharge all the semi-annual installments of interest theretofore accrued and then due and payable on all of the bonds issued and outstanding hereunder, or shall duly deposit with the Trust Company a sufficient amount for the purpose, and shall also duly pay unto the Trustees all such amounts, if any, as shall have been advanced or paid by the Trustees, or either of them, pursuant to any powers herein contained and for which they, he or it shall not have been reimbursed, and if the Company shall keep, perform and discharge each and every other covenant, obligation or condition herein assumed by or imposed upon it and in the keeping or performance or observance of which it shall at any time have made default, or shall cause the same to be done, or shall make payment of all damages, accrued; or to accrue, on account of each and every such default, or shall otherwise make good or repair all loss or damages resulting therefrom, including all Trustees' and other charges, and all taxes, assessments

and levies, then and in that event, each and every default theretofore made hereunder by the Company shall be deemed to be discharged, and each and every declaration, if any, theretofore made accelerating the maturity of the bonds hereby secured shall thereupon be deemed to be rescinded, revoked and annulled, and each and every right, power, privilege and authority herein reserved to the Company shall thereupon revive and be in full force and effect the same as if no default had occurred, and the Trustees shall not proceed with such sale, but the discharge of such default shall not prejudice any right of the Trustees or of the bondholders accruing from any subsequent default.

(There are here omitted certain provisions as to waiver of individual liability, redemption of bonds, sub-companies, release of property, and provisions as to bonds and Trustees.)

SECTION 3. The Company and the Trustees shall, upon reasonable request, execute such further instruments and do such further acts as may be necessary or proper to carry out more effectually the purposes of this mortgage, and in case of any sale by the Trustee of the property, assets or estates subject hereto in execution of the provisions hereof, the Company agrees to execute such further instruments as it may be advised are reasonably necessary or proper to perfect and assure the title to the property so purchased to the purchaser or purchasers thereof.

SECTION 4. The Trustees hereby accept the trusts created by this indenture, provided, however, that

nothing herein recited shall be construed to prevent them or either of them from resigning and being discharged from the trusts aforesaid.

In witness whereof, the said *Great Shoshone and Twin Falls Water Power Company* has hereunto, pursuant to the authority aforesaid, caused its name to be signed by its President or Vice-President, and its corporate seal hereunto to be affixed, attested by the signature of its Secretary or Assistant Secretary, and the said *The Trust Company of America* has hereunto caused its name to be signed by its President or Vice-President and its corporate seal to be hereunto affixed, attested by the signature of its Secretary or Assistant Secretary, and the said *James D. O'Neil* has hereunto set his hand and seal, all as of the day and date herein first above written.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY.

(Signed) By R. L. KESTER, Vice-President.

Done in duplicate.

Attest:

[Seal]

(Signed) W. B. MCCAIN, Secretary.

THE TRUST COMPANY OF AMERICA.

(Signed) By WM. H. LEUPP,

Attest:

[Seal] Vce-President.

(Signed) LAWRENCE SLADE, Secretary.

JAMES D. O'NEIL [Seal]

State of New York,

County of New York,—ss.

On this 23rd day of July, in the year 1910, before me, J. A. Allis, a Notary Public in and for the Coun-

ty of New York, in the State of New York, personally appeared R. L. Kester, known to me to be the Vice-President of the Great Shoshone and Twin Falls Water Power Company, the corporation that executed the within and foregoing instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year in this certificate first above written.

J. A. ALLIS,
Notary Public.

[Seal]

New York County, N. Y.

My commission expires March 31st, 1911.

State of New York,
County of New York,
City of New York,—ss.

On this 23rd day of July, in the year 1910, before me, J. A. Allis, a Notary Public in and for the County of New York, in the State of New York, personally appeared Wm. H. Leupp, known to me to be the Vice-President of The Trust Company of America, one of the corporations that executed the within and foregoing instrument, and acknowledged to me that such corporation executed the same, in evidence of its acceptance of the trusts thereby created.

In witness whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year in this certificate first above written.

(Signed) J. A. ALLIS,
Notary Public.

[Seal]

New York County, N. Y.

My commission expires March 31st, 1911.

State of New York,
County of New York,—ss.

On this 23rd day of July, in the year of our Lord 1910, before me, J. A. Allis, a Notary Public in and for the County of New York in the State of New York, personally appeared James D. O'Neil, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same, in evidence of his acceptance of the trusts hereby created.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

J. A. ALLIS,
Notary Public.

[Seal]

New York County, N. Y.

My commission expires March 31st, 1911.

EXHIBIT B.

(This is an indenture dated June 21, 1911, made by the Great Shoshone and Twin Falls Water Power Company to The Trust Company of America and James D. O'Neil, Trustees, conveying certain specific real property, described in complainant's Amendments to its Bill of Complaint on file herein, pursuant to the provisions of and upon the trusts and under the provisions set forth in the Mortgage or Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company to The Trust Company of America and James D. O'Neil, Trustees, dated May 1, 1910, identical with the copy thereof attached to the Bill of Complaint of the complainant herein and

marked Exhibit "A". Signed by R. L. Kester, Vice-President, and W. B. McCain, Secretary of Great Shoshone and Twin Falls Water Power Company, and sealed with the seal of said company, and duly acknowledged.)

EXHIBIT C.

(This is a Supplemental Mortgage dated April 7th, 1913, made by the Great Shoshone and Twin Falls Water Power Company to The Equitable Trust Company of New York and James D. O'Neil, as Trustees, conveying certain specific property, described in the complainant's Amendments to its Bill of Complaint on file herein, pursuant to the provisions of and upon the trusts and under the provisions set forth in the Mortgage or Deed of Trust dated May 1st, 1910, from the Great Shoshone and Twin Falls Water Power Company to The Trust Company of America and James D. O'Neil, as Trustees, identical with the copy thereof attached to the Bill of Complaint herein and marked "Exhibit A". Signed R. L. Kester, Vice-President, W. B. McCain, Secretary, Great Shoshone and Twin Falls Water Power Company, and sealed with the seal of said Company, and duly acknowledged.)

(Title of Court and Cause.)

SUPPLEMENTAL BILL OF COMPLAINT.

Equity—No. 526.

*To the Honorable the Judges of the District Court
of the United States for the District of Idaho,
Southern Division:*

And now comes The Equitable Trust Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, as Trustee under a certain deed of trust made by Great Shoshone and Twin Falls Water Power Company, and supplemental mortgages or deeds of trust, and pursuant to leave of court first had and obtained, brings this, its supplemental bill of complaint against Great Shoshone and Twin Falls Water Power Company, a corporation organized and existing under the laws of the State of Delaware, and a citizen of said State; William T. Wallace, as receiver of said Company and a citizen of the State of Idaho, and a resident of the Southern Division of the District of Idaho; Guy I. Towle, a citizen of the State of Idaho and a resident of the Southern Division of the District of Idaho; and Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, a citizen of the State of Idaho, and a resident of the Southern Division of the District of Idaho; and thereupon your Orator respectfully shows to the court as follows:

First. Your Orator filed its bill in this court and cause against the above named defendants and each

of them, on to-wit, April 14th, 1915, for the foreclosure of a certain mortgage or deed of trust and supplemental mortgages executed and delivered by said Great Shoshone and Twin Falls Water Power Company to The Trust Company of America and James D. O'Neil, as trustees, the predecessors in estate and title as such trustees of your Orator, The Equitable Trust Company of New York, to secure an issue of bonds by said Great Shoshone and Twin Falls Water Power Company to divers persons, partnerships and corporations, all of which more fully appears in said bill of complaint, to which this bill is filed as a supplement.

Second. In and by said bill of complaint referred to in the preceding paragraph, it is alleged, among other things,

“that on the second day of November, 1914 (the first day of said month being Sunday and a legal holiday), there fell due and became payable an instalment of interest upon the bonds issued under and secured by said Deed of Trust and said Supplemental Mortgages and now outstanding as aforesaid, which instalment amounted to the sum of fifty-five thousand seven hundred and fifty dollars (\$55,750). On said 2nd day of November, 1914, certain of the coupons appertaining to said bonds and maturing said day, evidencing the instalment of interest due and payable on said day, were duly presented for payment at the banking house of your Orator in the City of New York, as successor by merger to The Trust

Company of America, where, by their terms, said coupons were payable, and payment was then and there duly demanded, and the surrender of said coupons duly tendered; but payment thereon was wholly refused and said Great Shoshone and Twin Falls Water Power Company wholly defaulted in the payment of said coupons and in the payment of the semi-annual instalment of interest due November 2, 1914, on all of the bonds secured by said Deed of Trust and Supplemental Mortgages and now outstanding, and has ever since wholly failed, omitted and refused to pay or cause to be paid said semi-annual instalment of interest or any part thereof and has wholly failed, omitted and refused to pay or cause to be paid the coupons maturing November 2, 1914, and duly presented for payment as aforesaid, or any of them or any part thereof; and said Great Shoshone and Twin Falls Water Power Company has therein and thereby wholly made default in the covenants and conditions of said Mortgage."

Third. By said deed of trust so executed and delivered by Great Shoshone and Twin Falls Water Power Company to The Trust Company of America and James D. O'Neil, as trustees, a copy of which is annexed to said bill of complaint, which is filed in this cause and to which reference is hereby made with the same force and effect as if herein set out in full, it is, among other things, by Section 1 of Article Seven thereof, provided:

“In case the Company shall make any default (1) in the payment of any instalment of interest upon any of the bonds issued hereunder and secured hereby, and any such default shall continue for the period of six months after the payment of such instalment of interest shall have become due and been demanded * * * then and in either and any and every such case, the Trustees hereunder may in their discretion, and shall, upon the request of one-fifth in interest of the owners and holders of the bonds issued and then outstanding hereunder, by notice in writing delivered to the Company, declare the principal sums of all the bonds hereby secured to be immediately due and payable and the same shall thereupon become and be immediately due and payable.”

By said deed of trust (Article Seven, Section 3), it is further provided:

“In case the Company shall make any default (1) in the payment of any instalment of interest upon any of the bonds issued hereunder and hereby secured, and any such default shall continue for the period of six months after the payment of such instalment of interest shall have become due and been demanded, * * * then and in either and in any and every such case it shall be lawful for the Trustees, and on requisition in writing signed by the holders of not less than one-fifth in interest of the owners of the bonds issued and outstanding hereunder, and upon adequate indemnity against all costs, expenses and liabilities

to be by them incurred, it shall be the duty of the Trustees, to proceed to enforce the rights of the holders of the bonds issued and outstanding hereunder either by sale of the property hereby pledged, if the principal sums of the bonds hereby secured shall have been declared due and payable as herein provided, or by any other appropriate proceeding in any proper Court by way of remedy as the Trustees, being advised by counsel learned in the law, shall deem most effectual to enforce such rights or as such requisition may specify."

Fourth. The aforesaid default in the payment of interest accruing on the 2nd day of November, 1914, as alleged in the bill of complaint herein, and as quoted in this supplemental bill, has continued for more than six months since the 2nd day of November, 1914, when said instalment of interest became due and was demanded, as alleged in said bill, and as repeated by quotation herein, and said default still continues and has not been repaired or remedied or waived. On account of said default and of the continuance thereof for more than six months as aforesaid, your Orator, The Equitable Trust Company of New York, as sole successor trustee, under the said deed of trust and supplemental mortgages in the said original bill and herein alleged and referred to, has, by notice in writing, delivered to said Great Shoshone and Twin Falls Water Power Company and to William T. Wallace, as Receiver of said Company, declared the principal sum of all the bonds secured by said deed of trust and supplemental mortgages to be

immediately due and payable, and the same, amounting in the aggregate to \$2,230,000.00 thereupon became immediately, and is now, due and payable. Said declaration of principal due and notice thereof was executed by your Orator on the 21st day of August, 1915, and was on the 23rd day of August, 1915, duly delivered to the Great Shoshone and Twin Falls Water Power Company and was on the 30th day of August, 1915, duly delivered to William T. Wallace, as Receiver of property of said company. A copy of said declaration of principal due and notice thereof is attached hereto marked "Exhibit "A", and by reference made part hereof, and your Orator prays leave to refer to the same as fully and to the same extent as if at length incorporated herein. Since the filing of the original bill in this cause, and on, to-wit, the first day of May, 1915, there fell due and became payable an instalment of interest upon the bonds issued and secured by said deed of trust and said supplemental mortgages and outstanding as alleged in the said original bill, which instalment of interest amounted to the sum of Ffty-five Thousand Seven Hundred and Fifty Dollars (\$55,750). No part of said instalment of interest was paid upon said date, nor has the same been paid since, nor are any funds on hand with your Orator, or with any other person or corporation, nor has the defendant company or said defendant William T. Wallace, as such Receiver, any funds with which to pay said interest or any part thereof, but the same is wholly due and in default and unpaid.

Fifth. When this action was begun, the default in the payment of the interest which accrued on the 2nd day of November, 1914, had not continued for six months and default had not been made in the payment of interest subsequently accruing on said bonds, nor had the principal of the bonds been declared or become due. The right of the complainant to declare the principal of said bonds to be due and payable has accrued and the same has been declared due and payable and has become due and payable since the commencement of this action; and this supplemental bill is filed to enforce the rights of complainant and of the holders of the bonds issued and outstanding under said deed of trust and supplemental mortgages, by foreclosure of the said deed of trust and supplemental mortgages for the principal and accrued interest in default thereon.

Sixth. The rents, issues and profits of the property conveyed by said deed of trust and said supplemental mortgages are mortgaged for the payment of said bonds and the mortgaged property is insufficient to pay said mortgage debt.

Seventh. Each of the parties defendant claims to have some right or interest in the property covered by said deed of trust and said supplemental mortgages, all of which rights and interest, as complainant is informed and believes and therefore alleges, are subject to the rights of complainant and the holders of said bonds therein.

Eighth. Your Orator has asked and obtained leave

of court to file this supplemental bill and the same is filed pursuant to leave so granted and obtained.

In consideration whereof, and for as much as your Orator is remediless in the premises according to the rules of the common law and can have adequate relief only in a court of equity, your Orator repeats the prayers for relief in said original bill of complaint contained as if herein set out in full as applied to this supplemental bill and further prays this honorable Court:

1. That the said defendants herein named may be required by order of this Court, to separately and severally make answer unto all and singular the matters herein stated and charged, but not under oath, their answers under oath being hereby expressly waived.

2. That the Court find and adjudge that the principal of the said bonds issued and outstanding, as alleged in the bill of complaint herein, in the amount of Two Million, Two Hundred and Thirty Thousand Dollars (\$2,230,000) is due and payable, and that the said deed of trust bearing date of May 1st, 1910, and the supplemental mortgages hereinbefore and in the original bill referred to, may be foreclosed for said principal amount with interest thereon and for the amount of said unpaid instalments of interest and interest thereon.

3. That an account be had and taken of the bonds, interest coupons and interest secured by said deed of trust and supplemental mortgages, and the amount

due thereon, with the names of the lawful holders or owners thereof, be ascertained; that an account be taken of all property of every kind conveyed or pledged by said deed of trust and supplemental mortgages or intended so to be, whether acquired before or after the execution and delivery thereof; that said defendant company, and said Wallace as Receiver of its property be ordered to fully disclose what property and interest not specifically described in said original bill of complaint or in said deed of trust or said supplemental mortgages, are conveyed or transferred or intended to be conveyed or transferred by said deed of trust or said supplemental mortgages to your Orator, and compelled to convey or transfer the same to your Orator by way of further assurance; and that an account may be taken of all liens and incumbrances, if any, upon any of said mortgaged property or interest, and the priorities thereof determined.

4. That it be adjudged and decreed that a right of entry into and upon all the properties, franchises, premises, and rents, issues and profits thereof, conveyed or intended to be conveyed by said deed of trust and said supplemental mortgages, and each and every part thereof, has accrued to complainant and that complainant is entitled to have the rents, issues and profits thereof applied in accordance with the provisions of said deed of trust and said supplemental mortgages, and that said rents, issues and profits be so applied.

5. That the defendant, Great Shoshone and Twin Falls Water Power Company and William T. Wallace, as Receiver of its property, may be decreed to pay within a short time to be fixed by the Court, to the holders of the bonds and coupons secured by said deed of trust and supplemental mortgages, or to your Orator as trustee for said holders, the principal amount of said bonds and the defaulted interest thereon and all other sums due or to become due and payable under and by virtue of said deed of trust or of such bonds and coupons, together with a sum sufficient to pay the costs, expenses and allowances of this suit, and that in default thereof, all the properties, rights, privileges, interests and franchises of the defendant, Great Shoshone and Twin Falls Water Power Company be sold by the master of this Court, appointed for the purpose, as a single parcel without redemption, to satisfy the said claim or lien of the plaintiff and of the said holders of the bonds secured by the said deed of trust and supplemental mortgages.

6. That the rights, claims and liens of all the defendant parties to this suit be decreed to be inferior and subordinate to the lien or claim of your Orator as trustee under said deed of trust and supplemental mortgages, and that the right, title, claim and equity of redemption of all the defendants be perpetually barred and foreclosed.

7. That upon the coming in of the proceeds of sale, the Court make distribution thereof according to the law and the practice of the Court, the property

to be delivered to the purchaser free from all liens and claims of any of the parties to this cause.

8. That your Orator may have its proper costs, expenses and allowances and all other relief which it may in equity and in good conscience be entitled to, including all the relief prayed for in the original bill of complaint on file herein.

And your Orator will ever pray, etc.

THE EQUITABLE TRUST COMPANY OF NEW YORK.

By F. W. FULLE, Vice-President.
MURRAY, PRENTICE & HOWLAND,
SULLIVAN & SULLIVAN,
RICHARDS & HAGA,
Solicitors for Complainant.

CHARLES P. HOWLAND,
OLIVER O. HAGA,

Of Counsel.

United States of America,
Southern District of New York,
County of New York,—ss.

F. W. FULLE, being duly sworn, deposes and says that he is Vice-President of The Equitable Trust Company of New York, complainant which brings the foregoing supplemental bill of complaint; that he has read the said supplemental bill of complaint and knows the contents thereof; that the matters therein stated are true to his own knowledge, except as to the matters therein alleged on information and belief and as to those matters he believes it to be true.

F. W. FULLE.

Subscribed and sworn to before me this 9th day
of September, 1915. MYLES M. BOURKE,

Notary Public No. 222 New York County.

[Seal] Certificate No. 6148 filed in Register's
Office.

EXHIBIT A.

*To Great Shoshone and Twin Falls Water Power
Company and William T. Wallace, as Receiver of
Great Shoshone and Twin Falls Water Power
Company:*

The Equitable Trust Company of New York, as
the sole successor Trustee under a Deed of Trust
made by Great Shoshone and Twin Falls Water Pow-
er Company to The Trust Company of America and
James D. O'Neil, as Trustees, dated May 1, 1910, and
the mortgages supplementary thereto, dated June 21,
1911, and April 7, 1913, *hereby notifies you and each
of you that:*

Whereas, default has been made in the terms, cove-
nants and conditions of said Deed of Trust and Sup-
plemental Mortgages in that upon the 2nd day of
November, 1914 (the first day of said month being
Sunday and a legal holiday) there fell due and be-
came payable an installment of interest upon the
bonds issued under and secured by said Deed of Trust
and said Supplemental Mortgages and now outstand-
ing thereunder, which installment amounted to the
sum of fifty-five thousand seven hundred and fifty
dollars (\$55,750); and on said 2nd day of Novem-
ber, 1914, certain of the coupons appertaining to said

bonds and maturing on said day, evidencing the installment of interest on said bonds due and payable on the said day, were duly presented for payment at the Banking House of The Equitable Trust Company of New York (the successor by merger to The Trust Company of America), in the City of New York, and payment was then and there duly demanded and the surrender of said coupons duly tendered; but payment thereon was wholly refused and said Great Shoshone and Twin Falls Water Power Company wholly defaulted in the payment of said coupons and in the payment of the semi-annual installment of interest due November 2, 1914, evidenced thereby, and ever since has wholly failed, omitted and refused to pay or cause to be paid said semi-annual installment of interest or any part thereof and has wholly failed to pay or cause to be paid the coupons maturing November 2nd, 1914, and duly presented for payment, as aforesaid, or any of them; and,

Whereas, such default has continued for the period of six (6) months after the payment of such installment of interest became due and was duly demanded;

Now, Therefore, in accordance with the provisions of Section 1 of Article VII of said Deed of Trust dated May 1, 1910, between Great Shoshone and Twin Falls Water Power Company and The Trust Company of America and J. D. O'Neil, as Trustees, The Equitable Trust Company of New York as sole successor Trustee, aforesaid, has declared and does hereby declare the principal sums of all the bonds secured by said Deed of Trust and Supplemental

Mortgages now outstanding to be immediately due and payable and the same shall hereby become and be immediately due and payable,

In Witness Whereof, The Equitable Trust Company of New York, has caused its corporate seal to be hereto affixed, attested by its Secretary or Assistant Secretary and these presents to be signed in its name by its President or Vice-President this 21st day of August, 1915.

THE EQUITABLE TRUST COMPANY OF NEW

YORK. By LYMAN RHOADES, Vice-President.

(Corporate Seal.)

Attest:

J. N. BABCOCK,

Assistant Secretary.

(Duly verified.)

Endorsed: Filed Sept. 16, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

AMENDMENTS TO BILL OF COMPLAINT.

In Equity—No. 526.

To the Honorable the Judges of the District Court of the United States, for the District of Idaho, Southern Division:

Comes now the plaintiff, The Equitable Trust Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, as Trustee under a certain Deed of Trust made by defendant Great Shoshone and Twin

Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, and leave of court having been first had and obtained, makes and files the following amendments to the plaintiff's Bill of Complaint filed herein on April 14, 1915, to-wit:

Amend section Sixteenth of the Bill of Complaint, by striking out the whole thereof and inserting in lieu of said section Sixteenth, the following:

Sixteenth: Your orator is informed and believes, and therefore avers that at the time of the execution and delivery of said Deed of Trust, Exhibit "A", said Great Shoshone and Twin Falls Water Power Company was the owner of property of various kinds, which was referred to and generally described in and subjected to the lien of said Deed of Trust which was not specifically described therein; and also that since the date of the execution and delivery of said Deed of Trust dated May 1, 1910, certain other property, real, personal and mixed, and rights and interests (other than as specified and enumerated in said Supplemental Mortgages dated June 21, 1911, and April 7, 1913) have become subject to the lien of said Deed of Trust by reason of the acquisition thereof by said Great Shoshone and Twin Falls Water Power Company and under and pursuant to and by reason of the terms of said Deed of Trust.

Your orator is informed and believes and therefore avers, that the property owned by said Great Shoshone and Twin Falls Water Power Company at the

time of the execution of said Deed of Trust, and at the times of the execution of said Supplemental Mortgages, or acquired subsequent to the execution of said Deed of Trust or Supplemental Mortgages, and now owned by said Great Shoshone and Twin Falls Water Power Company, as the same now stands and exists, and which said property is subject to the lien of the said Deed of Trust and Supplemental Mortgages, is specifically described as follows, to-wit:

(There is omitted here a specific description of power sites, stations, sub-stations, other real estate, buildings, transmission lines, franchises, water permits and rights, all of which is also included in the general description that follows).

And generally all ~~other~~ rights and property of the Power Company now owned or in process of acquisition, and whether real, personal or mixed, including all power and other plants, water permits and rights, appropriations of water, dams, reservoirs, flumes, canals, tunnels, race ways, controlling works, water frontage, power sites, ferries, machinery, transmission and distributing lines, poles, wires, cables, telephone and telegraph lines, terminal properties, stations, sub-stations, docks, yards, machine shops, weirs, water wheels, office buildings, structures, tenements and hereditaments and appurtenances, bridges, boats, rolling stock, rights of way, dynamos, convertors, transformers, generators, switch boards, arresters, circuit breakers, meters, equipment, machinery, tools, implements, apparatus and appliances, stores, dwelling houses, sub-ways, conduits,

fixtures, supplies, furniture, chattels, stocks, bonds, certificates of interest, and other securities, choses in action, privileges, franchises, immunities, easements, accounts receivable, claims or demands due and owing to the Power Company, appurtenances, possessions, rights, tolls, rents, revenues, issues and profits, and also any and all estate, right, title and interest, property, possession, claim and demand whatsoever, as well in law as in equity, and whether specifically enumerated herein or not, of the Power Company, in and to all property whatsoever, real, personal and mixed, of every kind and description, and wheresoever situate, which the Power Company may have at any time or from any source acquired.

THE EQUITABLE TRUST COMPANY OF NEW YORK.

By MURRAY, PRENTICE & HOWLAND,
Residence: New York City, N. Y.;
SULLIVAN & SULLIVAN,
RICHARDS & HAGA,
Residence: Boise, Idaho;
Solicitors for Complainant.

CHARLES P. HOWLAND,
OLIVER O. HAGA,
Of Counsel.

(Duly verified.)

Endorsed: Filed October 26, 1915.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

APPEARANCE OF WILLIAM T. WALLACE AS
RECEIVER OF GREAT SHOSHONE AND
TWIN FALLS WATER POWER COMPANY.

To A. L. Richardson, Clerk of said Court:

I hereby enter the appearance of William T. Wallace as Receiver of Great Shoshone and Twin Falls Water Power Company, a defendant in the above entitled cause, and myself as his solicitor.

Dated May 3rd, 1915.

S. H. HAYS,

Solicitor for Defendant, William T. Wallace as
Receiver of Great Shoshone and Twin Falls
Water Power Company.

Endorsed: Filed May 4, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ANSWER.

Comes now the defendant herein, William T. Wallace, Receiver of the Great Shoshone and Twin Falls Water Power Company, for answer to the bill of complaint and to the supplemental bill of complaint filed in the above entitled cause and says:

1.

Admits the allegations contained in paragraphs 1, 2, 3, 5, 7 and 9 of the bill of complaint filed herein.

2.

Answering the tenth paragraph of the bill of complaint, defendant says that as shown by the books of

the company bonds to the aggregate amount of \$2,-230,000.00 were issued and authenticated by the certificate of the Trust Company of America as Trustee and that all of said bonds were duly certified; that the defendant has no information or belief sufficient to enable him to answer whether or not the said bonds were duly issued by the Great Shoshone and Twin Falls Water Power Company for a valuable consideration or in accordance with law or with the provisions of the said deed of trust, or whether all of the said bonds or any portion thereof so issued are now outstanding in the hands of divers persons or corporations who are the owners or holders thereof for value, or whether said bonds are valid or outstanding obligations of the Great Shoshone and Twin Falls Water Power Company, or are entitled to the benefits of the deed of trust mentioned in paragraph ten of the bill of complaint, and therefore denies the same.

3.

Defendant admits the allegations contained in the 12th and 13th paragraphs of the bill of complaint.

4.

Answering paragraph sixteen of the bill of complaint herein, defendant says that various parcels of real estate have been acquired by the defendant company at various times, none of which are mentioned in the bill of complaint herein; that various of said parcels were acquired between the time of the execution of the trust deed, Exhibit "A", and the supplemental mortgages, Exhibits "B" and "C", and that said parcels of real estate are not described in

said supplemental mortgages; that questions of law arise with regard to various of the parcels of property as to whether they are included within the terms of the said trust deed or mortgages set forth in the bill of complaint; that there is also certain property described in the various mortgages which is not now the property of the Great Shoshone and Twin Falls Water Power Company and never came into the charge of the receiver.

That prior to the receivership, the defendant company had entered into a contract with the owners of the light and water plant in the Town of Shoshone whereby they were to take over said light and water plant and were to pay therefor from the proceeds of the property, taking payment therefor at the rate of sixty per cent of all of the proceeds of the property until the total amount was paid; that during the receivership, under this arrangement, the full amount of the purchase price being sixty per cent of the amount of all proceeds, was fully paid.

That the said Electric Light and Water Works in the Village of Shoshone were mentioned and described in the mortgage, Exhibit "A", but at the time of the execution of the mortgage, the title thereto had not been procured, being only under contract; that arrangements are under way for the sale of the water works plant, being a part of the said property, to the Village of Shoshone although title to said property has not yet been taken by the company or the receiver.

That there is in the possession of the receiver herein a considerable amount of notes secured by mortgages for power accounts long past due; that there is also a considerable amount of accounts receivable long past due which are in the hands of the receiver.

That in the month of August, 1914, the defendant company had on deposit in the Milner State Bank the sum of \$17,695.79; that said bank closed its business and transferred its assets; that in the course of such liquidation, there remains due out of the assets of the said bank to the receivership estate a sum in excess of \$12,000.00, the remainder having been heretofore paid.

That all of the capital stock of the Jerome Water Works Company, a corporation operating a water works plant in the village of Jerome, was owned by the defendant company and is in the custody and charge of the receiver herein.

That there was also a ferry at Shoshone Falls owned at the time of the appointment of the receiver by the defendant company and which is in charge of the receiver herein.

That the defendant company owns two automobiles, three motorcycles and two teams used in the operation of the company, all of which is in the charge of the receiver.

That at the time of the appointment of the receiver there was on hand a large and miscellaneous assortment of construction material such as poles, wire, cross-arms and insulators, transformers and other

material of like kind intended for construction purposes; that a portion of said material had been intended to be used for the construction of a line from Mountain Home to Boise, which line had been abandoned and the material therefor was on hand; that a portion of said material not needed by the defendant company or the receiver has been sold by said receiver to the Southern Idaho Water Power Company, and an accounting therefor has been made.

That in addition to this, at the various offices of the company in Twin Falls, Oakley, Shoshone, Jerome, Glens Ferry, Gooding and Mountain Home, a stock of lamps, fans, small motors, heating devices and other merchandise was kept on hand for the convenience of the customers of the company and to supply them with appliances which they needed, these appliances being in the nature of appliances ordinarily carried in electric stores.

5.

Defendant herein further answering says that bonds of the company were issued as set forth in the bill of complaint herein in the total amount of \$2,230,000.00; that of said amount, \$2,225,000.00 were deposited as collateral with the Commonwealth Trust Company of Pittsburgh under a trust agreement to secure an issue of notes of \$1,780,000.00

6.

That defendant has no information or belief sufficient to enable him to answer whether said notes were regularly, lawfully or properly issued, and therefore denies the same; that defendant has no in-

formation or belief sufficient to enable him to answer as to whether the holders of said notes acquired the same in due course of business or were owners or holders for value; that in the month of April, 1915, and after the appointment of the receiver herein, the owners or pretended owners or holders of the said notes, or a portion of them, caused the bonds to the amount of \$2,225,000.00 of the Great Shoshone and Twin Falls Water Power Company to be sold under the terms of the trust agreement with the Commonwealth Trust Company above mentioned for the purpose of paying the amounts claimed to be due upon the said issue of notes; that said sale was without notice to the receiver herein and without his knowledge or consent.

That defendant has no knowledge, information or belief sufficient to enable him to answer as to whether or not said bonds were lawfully or properly sold or whether the purchasers thereof obtained any title thereto, and defendant therefore denies the same.

That as defendant is informed and believes, the said bonds were purchased at about the rate of twenty cents upon the dollar, said purchase being made by a committee of the note holders or the majority thereof, and that said committee claims the ownership of said bonds although they are held by the Guaranty Trust Company, a corporation, as trustee, which company has presented its account to the receiver herein for allowance and approval; that this action was instituted in this court at the instance of the said committee.

Wherefore, defendant prays that the court first ascertain the amount actually due upon the obligations of the Great Shoshone and Twin Falls Water Company, defendant herein, and that only so much of the property of said company be sold as is covered by the liens described in the bill of complaint herein, and that the defendant be given all proper relief.

S. H. HAYS,
Attorney for Defendant.
Residing at Boise, Idaho.

(Duly verified.)

Endorsed: Filed Oct. 26, 1915.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

APPEARANCE OF GREAT SHOSHONE AND
TWIN FALLS WATER POWER COMPANY, A
CORPORATION.

To A. L. Richardson, Clerk of said Court:

I hereby enter the appearance of Great Shoshone and Twin Falls Water Power Company, a corporation, a defendant in the above entitled cause, and myself as its solicitor.

Dated May 3rd, 1915.

P. B. CARTER,
Solicitor for Defendant, Great Shoshone and Twin
Falls Water Power Company, a corporation.
Endorsed: Filed May 4, 1915.

A. L. Richardson, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ANSWER.

Comes now the defendant, the Great Shoshone and Twin Falls Water Power Company, one of the defendants in the above entitled action, and answering the Bill of Complaint and the Supplemental Bill of Complaint admits each and every allegation of said Bill of Complaint and the Supplemental Bill of Complaint as therein set forth and specified.

P. B. CARTER,

Attorney for Great Shoshone and Twin Falls Water Power Company, Defendant.

Lodged Oct. 27, 1915.

(Title of Court and Cause.)

In Equity—No. 526.

ANSWER OF CARL J. HAHN, ADMINISTRATOR OF THE ESTATE OF HARRY M. KING, DECEASED.

Comes now Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, one of the defendants, and for answer to the plaintiff's complaint herein admits, denies and alleges as follows:

I.

This defendant, answering Paragraph XX of plaintiff's complaint, admits that he is the administrator of the estate of Harry M. King, deceased, and claims an interest in the property herein referred to and lien thereon by virtue of the judgment recovered in the United States District Court of the District of Idaho, but denies that his interest, however, is sub-

ject to the interest of the plaintiff herein, as trustee under said deed of trust and supplemental mortgages.

II.

This defendant further answering said complaint shows to the Court that prior to and on the 6th day of May, 1913, the Great Shoshone and Twin Falls Water Power Company, a corporation, and one of the defendants herein, was carrying on and discharging its duties as a public service corporation, engaged in generating, transmitting and distributing electric current in Ada, Elmore, Gooding, Owyhee, Lincoln and Twin Falls Counties, Idaho, and owned, controlled and operated an expensive distribution system of electrical, light, heat and power for domestic, commercial, irrigation and municipal purposes throughout the aforesaid counties in the State of Idaho, and is and was the owner of and in possession of a franchise to conduct a general electrical business and for the purpose of supplying heat, power and light and for other purposes in the city and county of Twin Falls, and in other cities and counties in the State of Idaho, for the purpose of conducting a general electric business, electric power and electrical energy, and the poles, wires, apparatus, machinery and other property useful in connection therewith, and that all the property owned by said corporation, including power plants and franchises, wires, poles and electrical apparatus used by said corporation is necessary for the use of said corporation in the operation of said electrical plant under said franchise.

III.

This answering defendant further shows to the Court that on the 6th day of May, 1913, and at all times hereinafter mentioned, the defendant corporation was transacting business in the County of Twin Falls under and by virtue of a charter from the State of Idaho, and the authorization to do business in the State of Idaho, and by virtue of a license and franchise in the County of Twin Falls maintained and operated electric plant, heat and power wire system in the County of Twin Falls, and maintained and operated a light and high tension power wires along what is known as the Buhl and Twin Falls public road and about one mile east of the City of Buhl, Idaho, in the County of Twin Falls, and State of Idaho, and on said date did pass through said light, heat and power wires a strong power or current of electricity, dangerous to the life of any human being who might come in contact therewith.

IV.

This answering defendant further shows to the Court that on said date the said deceased, Harry M. King, was in the employ of the defendant, Great Shoshone and Twin Falls Water Power Company, a corporation, to do and perform such work for said defendant as might be required of him upon the pole line of said defendant in the construction and repair of said pole line, under an uninsulated high tension power wire, charged with a dangerous and deadly current of electricity, and that while said deceased, Harry M. King, was in the employ of the defendant

as aforesaid under the orders, directions and commands of the defendant's foreman and agent, and while the said defendant was in the operation of and operating the said plant, and while the said deceased was in the performance of arduous and exacting duties, and while his mind and attention was fully and wholly engrossed in performing his duties for said defendant, in the operation and construction of said plant, and stretching and stringing the insulated high tension power wire charged with a deadly current of electricity at a place where he was ordered, directed and commanded to work for said defendant in the operation of said electrical plant by its foreman and agent in charge of said work, the defendant negligently and carelessly failed to ground said wire upon which the deceased was then working, and negligently and carelessly permitted the wire upon which the deceased was working and holding down for said defendant in the operation and construction of said plant under the orders, directions and commands of its agent and foreman, to become fastened under a small bush or tree and to become loosened from said bush or tree and to flip up against the uninsulated heat, light and power wires of said defendant, which was charged and loaded with a dangerous and deadly current of electricity, and to charge and load the wire upon which the deceased was working and holding down with a dangerous and deadly current of electricity by which the said Harry M. King, deceased, was severely shocked, burned and bruised, and from which the said Harry M. King, deceased, died on the

6th day of May, 1913, and left surviving him his widow, Katherine King, and his minor children, Margaret King, age eight years, and Alice King, aged six years, and left no other child nor descendants of deceased child.

V.

That thereafter on the 29th day of October, 1913, this answering defendant, filed a suit in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Twin Falls, against the Great Shoshone and Twin Falls Water Power Company, a corporation, and one of the defendants herein, for damages in the sum of \$46,480.50 for negligence and carelessness which resulted in the death of the said deceased, Harry M. King; that thereafter the said defendant Company caused said action to be removed to the District Court of the United States for the District of Idaho, Southern Division, where issue was joined in said court and on the 23rd day of September, 1914, said cause was duly tried in said District Court of the United States by a jury and the verdict returned thereafter in the sum of \$5590.00, together with costs and disbursements in the sum of \$174.35; a copy of which judgment is hereto attached, marked Exhibit "A" and made a part of the answer of this answering defendant, and that your petitioner prays that the same may be considered a part of this answer and referred to, to the same effect as if fully set forth in the body of this answer.

VI.

This answering defendant further shows to the Court that the passage or transmission of electric current of high voltage, such as the current from which the said deceased, Harry M. King, was injured and killed through wires or transmission lines, is without any warning whatsoever; that such electrical currents are without color, body, odor or sound, and the presence of such current in the wire can be determined only through the sense of touch, or by electrical apparatus especially designed for detecting the presence thereof. That such wire transmission lines are not of themselves harmless, but when charged with electrical energy become in the highest degree dangerous. That the deceased, Harry M. King, was without means or knowledge when or at what times wires connected with such transmission lines were charged with electrical energy and was compelled while engaged in his ordinary lawful and necessary duties and his daily vocation for defendant to go on and along said highway and in the immediate vicinity of said transmission wires, and in the presence of such hidden dangers, that accidents from contact with wires charged with electrical energy were frequent and inevitable. In the case of even carefully constructed, maintained or operated transmission lines and damages resulting therefrom by public service corporations, and persons interested in such corporations are necessarily incident to the operation of electric power plants and the transmission of electrical energy and such damages become a necessary

expense incident to the operation of such plants and transmission lines and a part of the anticipated and expected expense of such operation, and damages sustained as in the case of Harry M. King, deceased, should be considered on the same basis as claims for materials and supplies used in the operation of such plant, and that the aforesaid judgment is a liability contracted and incurred in the operation, use and enjoyment of the franchises of said corporation, and in the use and privilege of said franchise, and as a running expense of said corporation, and has priority over bonds and mortgages and other indebtedness against the franchise and property of said Company.

VII.

This answering defendant further shows to the Court that on November 2, 1914, the Honorable Judge of this Court appointed William T. Wallace Receiver of the Great Shoshone and Twin Falls Water Power Company to take charge of the property and assets of said company and is now in charge of said company and the assets thereof as receiver and conducting and operating the same under the orders and directions of this Court.

VIII.

This answering defendant further shows to the Court that prior to the appointment of receiver for the defendant, Great Shoshone and Twin Falls Water Power Company, the said defendant corporation on the 1st day of May, 1910, issued a series of bonds in the aggregate principal sum of not exceeding \$10,-

000,000.00, with interest at the rate of five per cent. per annum, payable semi-annually on the 1st day of May and November of each and every year, and that on November 2nd, 1914, the said defendant, Great Shoshone and Twin Falls Water Power Company, a corporation, defaulted in the payment of the interest due on said mortgage and bond issue and notwithstanding the default of said defendant company in the payment of the interest due on said November 1, 1914, the said plaintiff, the Equitable Trust Company of New York, as a holder of the bonds of said mortgage and bonds of said defendant, Great Shoshone and Twin Falls Water Power Company, a corporation, secured by said mortgage, permitted said defendant to continue in the possession and operation of the property covered by said mortgage and bond issue and in no wise at any time sought to take possession of said property from said defendant, Great Shoshone and Twin Falls Water Power Company, and at no time has an attempt been made by said plaintiff trustee or the said bondholders to take possession of the income being derived from the operation of said property so included in said mortgage, but on the contrary the said defendant, Great Shoshone and Twin Falls Water Power Company, has at all times since the issuance of said mortgage, and the receiver thereafter been permitted to continue in the use and possession of said income derived from the operation of said property in paying the current expense incurred in the operation of such property, and in expending the same in the construction of bet-

terments, enlargements and extensions of said property, and in the payment of interest and principal of said bonds for the benefit of said mortgagee, and the said bondholders and the said Great Shoshone and Twin Falls Water Power Company, a corporation, and defendant herein, and the receiver has expended large sums, the amount of which is unknown to this answering defendant, out of and from the income derived and received from the operation of such property in its construction of betterments, extensions and enlargements, and in paying interest on the underlying bonds, all for the benefit of the property embraced in such mortgage and inuring to the benefit of said bondholders.

IX.

This answering defendant further shows to the Court that the mortgage and bond issue of the defendant, Great Shoshone and Twin Falls Water Power Company, to the plaintiff herein, dated May 1, 1910, and supplemental mortgages, dated June 21, 1911, and April 7, 1913, do not cover or convey the gross assets and income of the property of the defendant, Great Shoshone and Twin Falls Water Power Company, but only covers the net assets and income of the defendant, Great Shoshone and Twin Falls Water Power Company, after the trustee or mortgagee has taken possession of the property under said mortgage, and then only subject to the general running and operating expenses of said corporation.

Wherefore, this answering defendant prays for an order or orders of this Court:

First. That the plaintiff in this cause of action, the defendant Power Company, and its receiver and defendant, Guy I. Towle, and any other parties to this action, or that may intervene in this cause of action, may be required to show cause, if any they have, why the said judgment so recovered by this answering defendant, and the amount thereof, should not be a preferred claim herein to be paid out of the income from the operation of said property, and if such income be insufficient therefor, that the same be adjudged and decreed a prior lien to the said mortgage and bond issue, and be paid out of the proceeds of the sale of said premises, prior to the payment of said mortgage and bond issue or the sums due and unpaid thereon.

Second. That the amount of said judgment be decreed a prior and superior lien against all the assets and property of the said Great Shoshone and Twin Falls Water Power Company, a corporation, and one of the defendants herein, and preferred in its payments to claims of all other persons and creditors including all parties to this action.

Third. That the said receiver be directed by an order of this Court to pay the amount of said judgment to this answering defendant out of any income from the operation of said property received by him, as such receiver, and now in his possession, or that may come into his possession, and in the event the

income so in his hands be insufficient to pay the amount of said judgment that the receiver be instructed to pay the same out of the proceeds of the sale of said premises, prior to the payment of the bonds so secured by said mortgage and supplemental mortgages.

Fourth. That the defendant, Great Shoshone and Twin Falls Water Power Company, a corporation, be required to set forth and file with this Court within a time set and fixed by the Court, a full statement of the income received by said defendant since the execution of said mortgage, and supplemental mortgages, derived from the operation of said property, and that said defendant company be further required to set forth a full and complete statement of the current expenses and operation of said corporation and business, the sums expended in construction of betterments, enlargements and extensions of the property and the sums and payments made upon interest and principal upon the mortgage indebtedness heretofore alleged and set out.

Fifth. That the plaintiff herein be required to set forth a full and complete statement of all the interest and principal received upon said mortgage indebtedness since the execution of said mortgage, and all other sums of money received by said plaintiff and trustee from said defendant, Great Shoshone and Twin Falls Water Power Company, for interest, principal, or otherwise, and that said statement be filed in this Court within a time set and fixed by this Court.

Sixth. That the said Receiver, William T. Wallace, be required to set forth and file with this Court a full and complete statement of all the income received of said receiver in the operation of said Great Shoshone and Twin Falls Water Power Company since taking possession by him as Receiver, together with a full and complete statement as to the sums expended by said Receiver in the construction of betterments, enlargements and extensions of said property, and the sum and payments, if any, made to the plaintiff in this cause of action in interest and principal upon the mortgage indebtedness heretofore alleged and set out in this answer, and that said Receiver be required to make and file with this Court said statement within such time as may be fixed by the Court to file such statement.

Seventh. That this answering defendant may have such other and further relief, judgments and decrees as to this Court may seem just and equitable, the premises considered.

JAMES H. WISE,

Attorney for Defendant, Carl J. Hahn.

(Duly verified).

EXHIBIT "A".

*In the District Court of the United States, District
of Idaho, Southern Division.*

CARL J. HAHN, Administrator of the Estate of
Harry M. King, Deceased, Plaintiff,

VS.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation,
Defendant.

JUDGMENT ON VERDICT OF JURY IN OPEN COURT.

This action came on regularly for trial on this the 22nd day of September, 1914, the plaintiff appearing in person and by his attorney, James H. Wise, of Twin Falls, Idaho, the defendant appearing by its attorneys, Samuel H. Hays and Pasco B. Carter. A jury of twelve persons was regularly empaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the Court, the jury retired to consider of their verdict and subsequently returned into Court with the verdict duly signed, finding for the plaintiff in the sum of Five Thousand Five Hundred Ninety Dollars.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, considered, and adjudged that said plaintiff do have and recover from said defendant the sum of \$5,590.00, together with

costs and disbursements in this action, taxed in the sum of \$174.35.

Filed Sept. 23, 1914. A. L. Richardson, Clerk.

Endorsed: Filed May 15, 1915.

A. L. Richardson, Clerk.

(Title of Court and Cause.)

In Equity—No. 526.

REPLY OF PLAINTIFF TO PLEADING DENOMINATED "ANSWER OF CARL J. HAHN, ADMINISTRATOR OF THE ESTATE OF HARRY M. KING, DECEASED."

And now comes The Equitable Trust Company of New York, plaintiff in the above cause, saving and reserving to itself all and all manner of advantages which may be had and taken, by motion or otherwise, to the many errors, uncertainties and insufficiencies of the alleged answer or counter-claim of the defendant Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, and for reply thereto saith that it doth and will aver, maintain and prove its said Bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the pleading of said defendant, denominated "Answer of Carl J. Hahn, Administrator of the Estate of Harry M. King, Deceased," is very uncertain, evasive, and insufficient in law to be answered or replied unto by this replicant, all which matters and things this replicant is ready to aver, maintain and prove, as this

Honorable Court shall direct, and humbly prays as in and by its said Bill it hath already prayed.

MURRAY, PRENTICE & HOWLAND,
SULLIVAN & SULLIVAN,
RICHARDS & HAGA,

Solicitors for Complainant.

CHARLES P. HOWLAND,

OLIVER O. HAGA,

Of Counsel.

Endorsed: Filed Oct. 2, 1915.

A. L. Richardson, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ANSWER OF GUY I. TOWLE, DEFENDANT.

The above named defendant, Guy I. Towle, now and at all times saving to himself all and all manner of benefit and advantage of exception, or otherwise that can be had or may be had or taken to the many errors, uncertainties and imperfections in complainant's Bill of Complaint (hereinafter called the "Bill") and complainant's Supplemental Bill of Complaint (hereinafter called "the Supplemental Bill") contained, for answer thereto, or to so much and such parts thereof as they are advised it is material or necessary for them to make answer to, and answering, say:

1. That at all places hereinafter in this answer where the terms defendants and the correlative plurals thereof are used, the same are meant to refer to

and should be construed as referring solely to this answering defendant, Guy I. Towle.

These defendants say that the following allegations made in the Bill are true, and they admit that:

(The paragraphs omitted here are identical with the paragraphs in the joint answer of L. M. Plumer and E. B. Scull, Executors of the estate of L. L. McClelland, deceased, set forth in this record, from paragraph one to paragraph nineteen inclusive and from paragraph twenty-three to the signatures of L. M. Plumer and E. B. Scull, and their attorneys.)

20.

These defendants deny that the interests of Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, or of this defendant, Guy I. Towle, or of any other creditor are subject to or inferior to the interest of complainant herein, in so far as complainant claims a lien upon personal or mixed property by virtue of said deed of trust and supplemental mortgages.

21.

And these defendants allege that heretofore on the 2nd day of November, 1914, in this Court, this defendant Guy I. Towle filed his complaint in this Court alleging among other things in said complaint in that action which was entitled in this Court, Guy I. Towle, Plaintiff, vs. The Great Shoshone and Twin Falls Water Power Company, Defendant, that said Great Shoshone and Twin Falls Water Power Company was justly and truly indebted to him in the

sum of \$12,857.29 with interest thereon at the rate of six per cent per annum from the 26th day of May, 1913, upon a demand promissory note of the said defendant company, of which note the defendant Guy I. Towle was on the said 2nd day of November, 1914, and still is the owner; that said claim came on for hearing in this Court on the 23rd day of October, 1915, in chambers, S. H. Hays appearing for the Receiver of said defendant Company and the Receiver thereof, William T. Wallace, also appearing in person, and Karl Paine appearing for this defendant Guy I. Towle; whereupon, the Honorable Judge of this Court, being satisfied in the premises, on the 23rd day of October, 1915, duly allowed said claim and approved and adjudged said claim to be a valid and liquidated claim against the said Great Shoshone and Twin Falls Water Power Company in the sum of \$13,963.01.

22.

These defendants allege that at the said time, October 23, 1915, and for some time prior thereto, since the 2nd day of November, 1914, all of the property of the Great Shoshone and Twin Falls Water Power Company had been and now is in the control of and under the supervision of this Court acting through said Receiver, William T. Wallace, and that these defendants have not now and have not had an opportunity to bring a suit upon this debt and claim against the Great Shoshone and Twin Falls Water Power Company and obtain a lien by having a writ

of attachment or other writ or process issued out of this or any other Court, and for the further reason that this defendant Guy I. Towle and other creditors of the said Company were forbidden by an order of this Court, made and entered on the 2nd day of November, 1914, from attaching or molesting the property of the said defendant Company.

23.

These defendants allege that said deed of trust as set forth in the Bill and marked Exhibit "A" purports to cover and subject to its lien, real, personal and mixed property but that neither the complainant nor its predecessors in interest, nor the Great Shoshone and Twin Falls Water Power Company, the mortgagor therein, or any one of them ever caused said mortgage or deed of trust to be accompanied by the affidavit of the mortgagor; that said mortgage or deed of trust is or was made in good faith and without design to hinder, delay or defraud creditors; and these defendants allege that said mortgage or deed of trust is not and has not been filed for record with the county recorder of the counties where the personal and mixed property described therein was and is kept; and that the recorder in said counties did not and has not since indorsed on the back the time of receiving it, and did not and has not filed the same in his office, to be kept there for the inspection of all persons interested, and that said deed of trust was not entered in a book showing a minute of all mortgages of personal property as in such mortgages of personal and mixed property the stat-

ute, Sections 3408 and 3409, Idaho Revised Codes, provide.

GUY I. TOWLE.

By KARL PAINE.

KARL PAINE,

Solicitor for Guy I. Towle.

(Duly verified.)

Endorsed: Filed Oct. 23, 1915.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity—No. 526.

MOTION.

Now comes the complainant and moves the Court to strike out the answer of Guy I. Towle, one of the defendants in said cause, filed October 23rd, 1915, for the reason that the allegations therein contained fail to set forth matter sufficient to disentitle complainant to the relief sought in the Bill.

MURRAY, PRENTICE & HOWLAND,

SULLIVAN & SULLIVAN,

RICHARDS & HAGA,

Solicitors for Complainant.

Endorsed: Filed Oct. 25, 1915.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

PETITION OF L. L. PLUMER AND E. B. SCULL,
EXECUTORS OF THE ESTATE OF L. L. McCLELLAND, DECEASED, TO INTERVENE
AND BE MADE PARTIES DEFENDANT.

*To the Honorable the Judge of the District Court of
the United States for the District of Idaho, South-
ern Division:*

The petition of L. M. Plumer and E. B. Scull, Executors of the estate of L. L. McClelland, deceased, respectfully shows:

1. That your petitioners are now the duly appointed, qualified and acting executors of the estate of L. L. McClelland, and as such, duly authorized to prosecute this petition on the claim hereinafter mentioned.

2. That, as such executors, your petitioners are now the owners and holders of a valid claim against the Great Shoshone and Twin Falls Water Power Company in the sum of \$15,625.00. That on or about the 2nd day of July, 1914, the said L. L. McClelland came into the possession, for a valuable consideration, of a negotiable promissory note made, executed and delivered by said Great Shoshone and Twin Falls Water Power Company to said L. L. McClelland, in the principal sum of \$20,000.00, payable five years after said July 2nd, 1914, at any bank in New York City, without interest.

That on or prior to the 2nd day of November, 1914, the said Great Shoshone and Twin Falls Water Power Company became insolvent and now is insolvent;

that on or about the said 2nd day of November, the defendant, Guy I. Towle, filed his bill of complaint in this Court against the defendant, Great Shoshone and Twin Falls Water Power Company, praying for the appointment of a receiver or receivers for said company and its property; that thereupon and on or about the 2nd day of November, 1914, this Court, by an order made that day, appointed the defendant, William T. Wallace, Receiver of the Great Shoshone and Twin Falls Water Power Company and of all of its property, and that said William T. Wallace duly qualified as such receiver and entered into the possession of said property and now is in possession of all of the property of said Great Shoshone and Twin Falls Water Power Company.

3. That upon the 5th day of May, 1915, this Court made an order that all creditors of the Great Shoshone and Twin Falls Water Power Company should file their claims with said receiver on or before the 10th day of August, 1915; that pursuant to such order the petitioners herein filed their said claim for \$20,000.00; that on the 16th day of October, 1915, upon a hearing upon said claim in chambers this Court allowed said claim and approved said claim at its present worth as of the date of the appointment of said receiver, in the sum of \$15,625.00.

That said sum of \$15,625.00 is now and since said 16th day of October, 1915, has been due, owing and unpaid, but that said receiver has not paid the same, and said receiver now fails and refuses to pay the same; that your petitioners have exhausted their

legal remedies; that ever since the said 16th day of October, 1915, when this claim of petitioners became due, it has been impossible for petitioners to sue on said claim at law, and attach, as said property and all thereof of the Great Shoshone and Twin Falls Water Power Company has been and is in the hands of said receiver, and all legal remedies, if any there be, are fruitless, and petitioners have been and are wholly unable to collect their said claim by pursuing their legal remedies.

4. That on the 14th day of April, 1915, complainant filed herein its bill of complaint seeking to foreclose a certain deed of trust and supplemental mortgage against all of the property of the said Great Shoshone and Twin Falls Water Power Company and seeking to have all of said property sold to pay a claim of \$2,230,000.00 which complainant claims due it. That unless these petitioners, creditors, are allowed to come in and answer the Bill of Complaint herein and set up their defenses, your petitioners will be precluded from participating in the distribution of the assets of said Great Shoshone and Twin Falls Water Power Company and complainant will be allowed to take all the property or the proceeds of the sale of all of said property to satisfy its claim of \$2,230,000.00.

5. That said deed of trust and mortgages set up in complainant's Bill are void as to personal and mixed property:

First: As said mortgage and first supplemental mortgage was not accompanied by the affida-

vit of good faith and valuable consideration required by Section 3408, Idaho Revised Codes.

Second: As said mortgage and first and second supplemental mortgages were not filed and indexed and recorded as a chattel mortgage as required by Section 3409, Idaho Revised Codes.

Third: As said mortgages provided for the taking and using of the incomes, revenues, rents, issues and profits of the Great Shoshone and Twin Falls Water Power Company and to enjoy the income arising from the property intended to be covered by said mortgages or deeds of trust by the mortgagor contrary to law.

6. That your petitioners should be allowed to intervene and plead to complainant's Bill of Complaint and set up their defenses and otherwise protect their rights. That your petitioners are informed and believe that unless they can have their claim settled out of the property which complainant claims is covered by its deed of trust and supplemental mortgages, that your petitioner's claim will be valueless.

Wherefore, your petitioners pray that they be allowed to intervene herein and be made parties defendant.

L. M. PLUMER,

E. B. SCULL,

As Executors of the Estate of L. L. McClelland, Deceased, by Paris Martin.

MARTIN & CAMERON, Solicitors.

(Duly verified.)

Endorsed: Filed Oct. 23, 1915.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ORDER ALLOWING L. M. PLUMER AND E. B. SCULL, EXECUTORS OF THE ESTATE OF L. L. McCLELLAND, DECEASED, TO INTERVENE AND BE MADE PARTIES DEFENDANT.

The petition of L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, to intervene and be made parties defendant herein having this day been presented to this Court, and it appearing to the Court from the matters stated therein that said L. M. Plumer and E. B. Scull should be allowed to intervene and be made parties herein, and the Court being fully advised in the premises;

It is hereby ordered that said petition be granted and the said L. M. Plumer and E. B. Scull, as executors of the estate of L. L. McClelland, are hereby made parties defendant, and are hereby permitted to plead herein and file their pleadings in this cause, and it is further ordered that henceforth said defendants or their solicitors, Martin & Cameron, be notified of all proceedings herein.

(Signed) FRANK S. DIETRICH,

Oct. 23, 1915.

District Judge.

Endorsed: Filed Oct. 23, 1915.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

JOINT ANSWER.

The intervening defendants, L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClel-

land, deceased, now and at all times saving to themselves all and all manner of benefit and advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in complainant's Bill of Complaint (hereinafter called "the Bill"), and complainant's Supplemental Bill of Complaint (hereinafter called "the Supplemental Bill"), and complainant's Amended Bill contained for answer thereto, or to so much and such parts thereof as they are advised it is material or necessary for them to make answer to, and jointly answering say:

1.

These defendants say:

(a) That leave to intervene in the above entitled case as defendants and to file this answer in intervention has heretofore, before the filing hereof, been obtained from the above entitled court.

These defendants say that the following allegations made in the Bill are true, and they admit that:

First: The complainant is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business at No. 37 Wall Street, in the Borough of Manhattan, City of New York, in said State, and is authorized by law and its certificate of incorporation to accept and execute trusts of the character hereinafter set forth.

2.

And these defendants admit that:

Second: The defendant, Great Shoshone and Twin

Falls Water Power Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, of which State it is a citizen, and having its statutory office in Wilmington in the said State, but has all of its property and business in the State of Idaho, where it is duly licensed to carry on business and where its principal office and place of business is at Twin Falls, in Twin Falls County; and that William T. Wallace is a citizen of the State of Idaho and a resident of Twin Falls County in said State; and that the defendant, Guy I. Towle, is a citizen of the State of Idaho and a resident of Lincoln County, in said State; and that the defendant, Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, is a citizen and resident of the State of Idaho.

3.

And these defendants admit the allegations of the "Third" paragraph of the Bill filed herein.

4.

These defendants deny that on or about the 21st day of July, 1910, or at any other time or at all, that said Great Shoshone and Twin Falls Water Power Company, *duly* made and executed to the Trust Company of America, of the City of New York and State of New York, and James D. O'Neil, of the City of Pittsburgh, State of Pennsylvania, or to any one else or at all, as Trustee, or otherwise, its certain, or any certain, deed of trust bearing date May 1, 1910, a copy of which is annexed to the Bill and marked Exhibit "A".

These defendants deny that in and by, or in or by, said deed of trust or otherwise, in order to secure the due and punctual payment of the principal and interest, of all of the aforesaid bonds and at any time outstanding, or for any purpose or at all granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred, set over or in any manner whatsoever transferred or parted with, unto any one, or at all all of the, or any of the parcels, premises, properties, rights, permits, plants, dams, reservoirs, flumes, canals, tunnels, raceways, controlling works, machinery, lines, buildings, improvements, water wheels, weirs, generators, dynamos, switchboards, transformers and all machinery, appliances, appurtenances, franchises, or all or any other property either personal or mixed of said Great Shoshone and Twin Falls Water Power Company, whether then owned or thereafter acquired as enumerated or referred to in said deed of trust dated May 1, 1910, or otherwise, in any manner whatsoever.

5.

These defendants admit the allegation contained in paragraph "Fifth" of the Bill that, Fifth: The tangible property described in and covered by said deed of trust is situated in the Counties of Twin Falls, Lincoln, Elmore, Cassia, Owyhee and Ada, in the State of Idaho, and elsewhere in the Southern Division of the District of Idaho.

These defendants deny the allegation contained in paragraph "Fifth" of the Bill that said deed of trust was *duly* or otherwise recorded in the office of the

County Recorder of Twin Falls County, State of Idaho, on August 2nd, 1910, or at any time or at all, and recorded in Book 14 of Mortgages at pages 54 to 88 inclusive, and that the fees and taxes, or fees or taxes thereon were paid; deny that said deed of trust was duly, or otherwise, recorded in the office of the Recorder of Lincoln County, State of Idaho, on the 2nd day of September, 1913, or at any other time or at all, in Book 39 of Mortgages at page 210, and the fees and taxes, or fees or taxes thereon were paid; deny that said deed of trust was duly, or otherwise, recorded in the office of the recorder of Cassia County, State of Idaho, on the 13th day of September, 1913, or at any other time or at all, in Book 7 of Mortgages at page 37, and the fees and taxes thereon paid; deny that said deed of trust was duly or otherwise recorded in the office of the recorder of Owyhee County, State of Idaho, on the 16th day of October, 1913, or any other time or at all, in Book 10 of Mortgages, at page 250, and the fees and taxes thereon paid; and deny that said deed of trust was duly, or otherwise, recorded in the office of the recorder of Ada County, State of Idaho, on the 30th day of September, 1913, or at any other time or at all, in Book 74 of Mortgages at pages 118-183, and the fees and taxes thereon paid.

6.

These defendants deny the allegations contained in paragraph "Sixth" of the Bill that on or about the 21st day of June, 1911, or any other time or at all, said Great Shoshone and Twin Falls Water Power

Company duly, or otherwise, made, executed or delivered to said The Trust Company of America or said James D. O'Neil, as trustees, or otherwise, a certain, or any instrument or indenture by way of Supplemental Mortgage bearing date June 21, 1911, a copy of which is annexed to the Bill and marked Exhibit "B". Deny that in or by said Supplemental Mortgage dated June 21, 1911, or in any manner or at all, said Great Shoshone and Twin Falls Water Power Company, for any purpose whatsoever, granted, bargained, sold, conveyed or confirmed unto the said The Trust Company of America or said James D. O'Neil, as trustees, or otherwise, or to their successor or successors, certain, or any property, except the real property therein set forth.

Deny that said Supplemental Mortgage, dated June 21, 1911, was *duly*, or otherwise, recorded, except for a real estate mortgage, in the office of the Recorder of said Lincoln County, State of Idaho, on the 30th day of June, 1911, in Book 20 of Deeds at page 208.

7.

These defendants admit that The Equitable Trust Company of New York succeeded to all the rights, duties, powers and property of said The Trust Company of America, under the said Deed of Trust dated May 1, 1910, and under the said Supplemental Mortgage dated June 21, 1911, and has become and now is trustee thereunder and is now acting as such trustee, except that these defendants deny that the said Deed of Trust, or said Supplemental Mortgage ever

in any manner conveyed, transferred or set over to a trustee or any other person, or corporation or association, the personal or mixed property of the said Great Shoshone and Twin Falls Water Power Company.

8.

These defendants deny that on or about the 7th day of April, 1913, or at any other time or at all, said Great Shoshone and Twin Falls Water Power Company, being thereunto duly authorized by its board of directors, and by its stockholders, duly, or otherwise, made, executed or delivered to complainant or to James D. O'Neil, as trustees, or otherwise, a certain instrument, entitled, "Supplemental Mortgage," bearing date April 7, 1913, a copy of which is attached to the Bill and marked Exhibit "C". These defendants deny that in or by said Supplemental Mortgage said Great Shoshone and Twin Falls Water Power Company, for any purpose granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred or set over to complainant or said James D. O'Neil, as trustees, or their successor or successors in trust, certain or any property whatsoever except the real property, and specifically deny that the personal and mixed property was in any manner conveyed, as fully or otherwise set forth in said Supplemental Mortgage.

9.

These defendants deny that said Supplemental Mortgage dated April 7th, 1913, was duly, or otherwise, recorded, except as a real estate mortgage, in

the office of the Recorder of Lincoln County, State of Idaho, on the 30th day of July, 1913, or at any other time or at all, in Book 18 of Mortgages, page 285, and deny that said Supplemental Mortgage dated April 7, 1913, was duly, or otherwise, recorded, except as a real estate mortgage, in the office of the Recorder of Lincoln County, State of Idaho, on the 15th day of July, 1913, or at any other time or at all, in Book 23 of Mortgages, page 552, and deny that said Supplemental Mortgage dated April 7, 1913, was duly, or otherwise, recorded, except as a real estate mortgage, in the office of the Recorder of Owyhee County, State of Idaho, on the 25th day of September, 1913, or at any other time or at all, in Book 10 of Mortgages, page 221; and deny that said Supplemental Mortgage was duly, or otherwise, recorded except as a real estate mortgage, in the office of the Recorder of Elmore County, State of Idaho, on the 13th day of September, 1913, or at any other time or at all, in Book 39 of Mortgages, page 279; and deny Supplemental Mortgage, dated April 7, 1913, was duly, or otherwise, recorded, except as a real estate mortgage, in the office of the Recorder of Gooding County, State of Idaho, on the 15th day of August, 1913, or at any other time or at all; and deny that said Supplemental Mortgage, dated April 7th, 1913, was duly, or otherwise, recorded, except as a real estate mortgage, in the office of the Recorder of Minidoka County, State of Idaho, on the 27th day of August, 1913, or at any other time or at all, in Book 1 of Mortgages, page 269; and deny that said Supple-

mental Mortgage dated April 7, 1913, was duly, or otherwise, recorded, except as a real estate mortgage, in the office of the Recorder of Ada County, State of Idaho, on the 7th day of Jenuary, 1914, or at any other time or at all, in Book 74 of Mortgages, page 396; and deny that said Supplemental Mortgage was duly, or otherwise, recorded, except as a real estate mortgage, in the office of the Recorder of Cassia County, State of Idaho, on the 28th day of July, 1913, or at any other time or at all, in Book 6 of Mortgages, page 575.

These defendants deny that complainant duly, or otherwise, accepted the trusts created by said Supplemental Mortgage dated April 7, 1915, except as to the real property, and denies that all or any of the bonds issued and outstanding under the said Trust Deed dated May 1st, 1910, are entitled to the benefit of the security, except the real property of said Supplemental Mortgage dated April 7, 1913, or of said Trust Deed dated May 1st, 1910, or the above mentioned Supplemental Mortgage dated June 21, 1911.

10.

These defendants admit that after the execution and delivery of said Deed of Trust, dated May 1st, 1910, said Great Shoshone and Twin Falls Water Power Company made and executed bonds under said Deed of Trust to the aggregate principal amount of \$2,230,000.00, all of which bonds were authenticated by the certificate of the Trust Company of America, as Trustee, or by complainant as successor trustee endorsed thereon, as provided in said bonds and Deed

of Trust; admits that said bonds were issued by said Great Shoshone and Twin Falls Water Power Company for a valuable consideration; but these defendants deny that said bonds were issued in accordance with law, and denies that said bonds are valid and outstanding obligations of the Great Shoshone and Twin Falls Water Power Company, and deny that the bondholders are entitled to the benefits of said Deed of Trust and of the above mentioned Supplemental Mortgages dated June 21, 1911, and April 7, 1913, respectively, as against these defendants, creditors of said Great Shoshone and Twin Falls Water Power Company.

11.

These defendants admit the allegations set forth in the Bill in paragraph "Eleventh," except that these defendants deny that on said November 2nd, 1914, said Great Shoshone and Twin Falls Water Power Company wholly, on said date, made default in the covenants and conditions of said mortgage.

12.

These defendants admit the allegations set forth in the Bill, in paragraph "Twelfth" thereof, except that these defendants deny that on the date the Bill herein was filed, to-wit, on the 14th day of April, 1915, that said Great Shoshone and Twin Falls Water Power Company had not wholly made default in respect to the interest payment which fell due on the 2nd day of November, 1914, but which was not wholly in default until six months thereafter.

13.

These defendants admit the allegations set forth in the Bill, in paragraph "Thirteenth" thereof, except that these defendants deny that complainant became and is now vested with or should be entitled to exercise at all, or any rights whatsoever, or powers, over the personal or mixed property described in said Deed of Trust or in said Supplemental Mortgages.

14.

These defendants admit the allegations of the Bill, in paragraph "Fourteenth" thereof.

15.

These defendants admit the allegations of the Bill, set forth in paragraph "Fifteenth" thereof.

16.

These defendants deny that at the time of the execution of said Deed of Trust or at any other time or at all, that said Great Shoshone and Twin Falls Water Power Company was the owner of property of various kinds, which was referred to or generally described in, or subjected to said Deed of Trust or which was not specifically described therein; and deny that since the date of the execution or delivery of said Deed of Trust dated May 1, 1910, certain or any other property, real, personal or mixed, or rights or interests (other than as specified or enumerated in said Supplemental Mortgages dated June 21, 1911, and April 7, 1913) have become subject to the lien of said Deed of Trust for any reason whatsoever, and that as to personal and mixed property

these defendants allege that such property never became and is not now subject to said or any Deed of Trust or said or any Supplemental Mortgages.

17.

These defendants admit the allegations set forth in paragraph "Seventeenth" of the Bill, except that these defendants deny that all other property other than that described in said paragraph "Seventeenth" of the kind or nature described in said Deed of Trust and owned by said Great Shoshone and Twin Falls Water Power Company at the time of the execution and delivery of said Deed of Trust or acquired by said Great Shoshone and Twin Falls Water Power Company since that time is subjected to the lien or any lien of said Deed of Trust; that all of the \$2,-230,000.00 in principal amount of bonds issued and outstanding are entitled to the benefit of such lien except as to the real estate described in said Deed of Trust.

18.

These defendants admit the allegations set forth in paragraph "Eighteenth" of the Bill.

19.

These defendants admit the allegations of paragraph "Nineteenth" of the Bill.

20.

These defendants deny that the interests of Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, or of any other creditor, are subject to interest of complainant herein, in so far as com-

plainant claims a lien upon personal or mixed property by virtue of the said deed of trust and supplemental mortgages.

21.

And these defendants allege that on the 10th day of August, 1915, pursuant to an order of this Court, made in the cause entitled Guy I. Towle, plaintiff, against Great Shoshone and Twin Falls Water Power Company, defendant, brought in this Court, that these defendants, as executors of the estate of L. L. McClelland, deceased, duly filed a claim against the Great Shoshone and Twin Falls Water Power Company based upon a promissory note dated July 2nd, 1914, in the principal sum of \$20,000.00, due on the 2nd day of July, 1919, payable to L. L. McClelland and made, executed and delivered by the Great Shoshone and Twin Falls Water Power Company; that said claim came on for hearing before this Court on the 16th day of October, 1915, in chambers, S. H. Hays, Esquire, appearing for the Receiver, and William T. Wallace, Receiver, also appearing in person, and Martin & Cameron appearing for these defendants, whereupon, the judge of this Court being satisfied in the premises, on the 16th day of October, 1915, duly allowed said claim and approved and adjudged said claim to be a valid and liquidated claim against the said Great Shoshone and Twin Falls Water Power Company in the sum of \$15,625.00.

22.

These defendants allege that at the said time, October 16th, 1915, and for some time prior thereto,

since the 2nd day of November, 1914, all of the property of the said Great Shoshone and Twin Falls Water Power Company had been and now is in the control and under the supervision of this Court acting through said Receiver, W. T. Wallace, and that these defendants have not now and have not had an opportunity to bring a suit upon this debt of the Great Shoshone and Twin Falls Water Power Company and obtain a lien by having a writ of attachment or other writ or process issued out of this or any other Court, and for the further reason that this debt, according to its terms, was not to have been due until July 2nd, 1919, had it not become due by operation of law, on the 2nd day of November, 1914, ever since which time, as above said, the property of the said Great Shoshone and Twin Falls Water Power Company has been in the hands of said Receiver.

23.

These defendants allege that said deed of trust, as set forth in the Bill marked Exhibit "A", purports to cover and subject to its lien, real, personal and mixed property, but that neither the complainant nor its predecessors in interest, nor the Great Shoshone and Twin Falls Water Power Company, the mortgagor therein, or any one for them ever caused said mortgage or deed of trust to be accompanied by the affidavit of the mortgagor; that said mortgage or deed of trust is or was made in good faith and without design to hinder, delay or defraud creditors; and these defendants allege that said mortgage or deed of trust is not and has not been filed for record with the County Recorder of the counties where the per-

sonal and mixed property described therein was and is kept; and that the Recorder in said counties did not and has not since indorsed on the back the time of receiving it, and did not and has not filed the same in his office, to be kept there for the inspection of all persons interested, and that said deed of trust was not entered in a book showing a minute of all mortgages of personal property as in such mortgages of personal and mixed property the statute, Sections 3408 and 3409, Idaho Revised Codes, provide.

24.

These defendants allege that said Supplemental Mortgage dated June 21, 1911, and marked Exhibit "B" in the Bill, purports to cover and subject to its lien, real, personal and mixed property, but that neither the complainant nor its predecessors in interest, nor the Great Shoshone and Twin Falls Water Power Company, the mortgagor therein, or any one for them, ever caused said Supplemental Mortgage to be accompanied by the affidavit of the mortgagor that said Supplemental Mortgage is or was made in good faith and without design to hinder, delay or defraud creditors; and these defendants allege that said Supplemental Mortgage is not and has not been filed for record with the County Recorder of the Counties where the personal and mixed property described therein was and is kept; and that the Recorder in said Counties did not and has not since indorsed on the back the time of receiving it, and did not and has not filed the same in his office, to be kept there for the inspection of all persons interested, and

that said Supplemental Mortgage was not entered in a book showing a minute of all mortgages of personal property, as in such mortgages of personal and mixed property the statute, Sections 3408 and 3409, Idaho Revised Codes, provides.

These defendants allege that said deed of trust and supplemental mortgages, B and C, provide for the mortgaging to the complainant, the tolls, incomes and revenues of the Great Shoshone and Twin Falls Water Power Company, and further provide that the said mortgagor company may take and use the incomes, revenues, rents, issues and profits of the said company and the property mortgaged in said deed of trust and supplemental mortgages, to the use and benefit of said Great Shoshone and Twin Falls Water Power Company, and said provisions render said deed of trust and supplemental mortgages null and void as to these defendants, creditors of said company, as to the tolls, incomes, revenues, issues, rents and profits of said Company, and its property attempted to be mortgaged, and also as to all other property mentioned in complainant's Bill of Complaint and the supplements and amendments thereto, as being covered by the deed of trust and mortgages therein mentioned.

25.

These defendants allege that said Supplemental Mortgage dated the 7th day of April, 1913, and marked Exhibit "C" in the Bill, purports to cover and subject to its lien, real, personal and mixed property, but that neither the complainant nor its pre-

decessors in interest, nor any one for them, ever filed said Supplemental Mortgage with the County Recorder of the Counties where the personal and mixed property described therein was and is kept; and that the Recorder in said Counties did not and has not since endorsed on the back the time of receiving it, and did not and has not filed the same in his office, to be kept there for the inspection of all persons interested, and that said Supplemental Mortgage was not entered in a book showing a minute of all mortgages of personal property, as in such mortgages of personal and mixed property the statute, Sections 3408 and 3409, Idaho Revised Codes, provides.

26.

These defendants allege that since the property, real, personal and mixed, of the Great Shoshone and Twin Falls Water Power Company is in the control and possession of this Court ever since November 2nd, 1914, and that since it is not possible, by law, to obtain a lien on said property, and since by operation of law, the complainant herein foreclosing its deed of trust and supplemental mortgages has no prior lien upon the personal and mixed property of the Great Shoshone and Twin Falls Water Power Company, on account of not accompanying said mortgage or deed of trust, and supplemental mortgages, with an affidavit of good faith as required by statute and on account of not recording said mortgage and supplemental mortgages as a chattel mortgage as required by law, that said mortgage or deed of trust and supplemental mortgages are void as against

these defendants, creditors, and that these defendants should be entitled to a prior lien upon said personal and mixed property of said Great Shoshone and Twin Falls Water Power Company as of the date of August 10th, 1915, as these defendants would otherwise have been entitled to an attachment lien had not the property of said Great Shoshone and Twin Falls Water Power Company been in the hands of the Court.

27.

That as to all the personal and mixed property of the said Great Shoshone and Twin Falls Water Power Company, the allowed and adjudicated claim of these defendants is prior and paramount to the claims of complainant or its deed of trust or supplemental mortgages.

28.

These defendants answer the Supplemental Bill of Complaint (hereinafter called "the Supplemental Bill") and admit, deny and allege as follows:

* 1.

Admit the allegations of paragraph "First" of said "Supplemental Bill".

2.

Admit the allegations of paragraphs "Second", "Third", "Fourth", "Fifth" and "Sixth" of said Supplemental Bill.

3.

These defendants deny that the defendants named in said Supplemental Bill have claims to some right, title or interest in the personal and mixed property

pretended to be covered by said deed of trust and supplemental mortgages which claims are subsequent to complainant's lien by virtue of said deed of trust and supplemental mortgages.

Wherefore, these defendants pray:

1. That said deed of trust and supplemental mortgages be declared null and void as a lien upon personal and mixed property of said Great Shoshone and Twin Falls Water Power Company.

2. That the Receiver of said personal and mixed property be required to satisfy the claim of these defendants first out of said personal and mixed property, or the proceeds thereon; and that these defendants, prior to the time of sale, if necessary on account of the claims of other creditors, be held to have the equivalent of a prior lien upon enough of the personal and mixed property of said Great Shoshone and Twin Falls Water Power Company to insure the payment of the claim of these defendants.

3. That these defendants may be awarded their costs and disbursements herein, and such other and further relief as to the Court may seem just and equitable.

L. M. PLUMER and

E. B. SCULL,

Executors of the Estate of L. L. McClelland, Deceased.

By MARTIN & CAMERON,

Their Attorneys.

MARTIN & CAMERON, Solicitors.

(Duly verified.)

Endorsed: Filed Oct. 23, 1915.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

MOTION.

Now comes the complainant and moves the Court as follows:

(a) To vacate and set aside the order made herein on the 23rd day of October, 1915, allowing L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, to intervene and be made parties defendant in this cause, which order was made *ex parte* and without notice of application therefor to complainant, for the reason that the petition therefor filed by said intervenors is insufficient in law and does not set forth facts sufficient to entitle said parties to intervene or be made parties defendant in said cause.

(b) To dismiss the petition of the said L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, to intervene and be made parties defendant, for the reason that the said petition is wholly insufficient in law and equity and does not set forth facts sufficient to entitle said petitioners to intervene or be made parties defendant in said cause.

(c) To strike out what is denominated a "Joint Answer" of the defendants and interveners L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, for the reason that it appears therefrom that said interveners have not such interest in this litigation as will entitle them to intervene and be made parties defendant in said cause, and the matters set forth in said alleged joint

answer do not constitute a proper defense to complainant's Bill of Foreclosure.

MURRAY, PRENTICE & HOWLAND,
SULLIVAN & SULLIVAN,
RICHARDS & HAGA,

Solicitors for Complainant.

Endorsed: Filed Oct. 25, 1915.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

PETITION OF JAKE M. SHANK TO INTER-
VENE AND BE MADE A PARTY DEFEND-
ANT.

*To the Honorable, the Judge of the District Court
of the United States, for the District of Idaho,
Southern Division:*

The petition of Jake M. Shank respectfully shows:

1.

That your petitioner is now the owner and holder of a valid claim against the Great Shoshone and Twin Falls Water Power Company, in the sum of Four Thousand, Three Hundred Ninety Dollars.

2.

That on or prior to the 2nd day of November, 1914, the said Great Shoshone and Twin Falls Water Power Company became insolvent and now is insolvent; that on or about the said 2nd day of November, the defendant, Guy I. Towle, filed his bill of complaint in this Court against the defendant, Great Shoshone and Twin Falls Water Power Company, praying for

the appointment of a receiver or receivers of said company and its property; that thereupon and on or about the 2nd day of November, 1914, this Court, by an order made that day, appointed the defendant William T. Wallace, Receiver of the Great Shoshone and Twin Falls Water Power Company and of all of its property, and that said William T. Wallace duly qualified as such receiver and entered into the possession of said property and now is in possession of all of the property of said Great Shoshone and Twin Falls Water Power Company.

3.

That upon the 5th day of May, 1915, this Court made an order that all creditors of the Great Shoshone and Twin Falls Water Power Company should file their claims with the said receiver on or before the 10th day of August, 1915; that pursuant to such order the petitioner herein filed his said claim for Four Thousand Dollars; that on the 25th day of October, 1915, upon a hearing upon said claim in chambers, this Court allowed said claim and approved said claim at its present worth as of the date of the appointment of said receiver in the sum of Four Thousand Three Hundred Ninety Dollars.

That said sum of Four Thousand Three Hundred Ninety Dollars is now and since the 25th day of October, 1915, has been due, owing and unpaid, but that said receiver has not paid the same, and said receiver now fails and refuses to pay the same; that your petitioner has exhausted his legal remedies; that ever since the 25th day of October, 1915, when this

claim of petitioner became due, it has been impossible for petitioner to sue on said claim at law, and attach, as said property and all thereof of the Great Shoshone and Twin Falls Water Power Company has been and is in the hands of said receiver and all legal remedies, if any there be, are fruitless, and petitioner has been and is wholly unable to collect his said claim by pursuing his legal remedies.

4.

That on the 14th day of April, 1915, complainant filed herein its bill of complaint seeking to foreclose a certain deed of trust and supplemental mortgages against all of the property of the said Great Shoshone and Twin Falls Water Power Company and seeking to have all of said property sold to pay a claim of \$2,230,000.00, which complainant claims due it. That unless the petitioner, a creditor, is allowed to come in and answer the bill of complaint herein and set up his defense, your petitioner will be precluded from participating in the distribution of the assets of the Great Shoshone and Twin Falls Water Power Company and complainant will be allowed to take all the property or the proceeds of sale of all of said property to satisfy its claim of \$2,230,000.00.

5.

That said deed of trust and mortgages set up in complainant's bill are void as to personal and mixed property:

First: As said mortgage and first supplemental mortgage was not accompanied by the affidavit of

good faith and valuable consideration required by Section 3408, Idaho Revised Codes.

Second: As said mortgage and first and second supplemental mortgages were not filed and indexed recorded as a chattel mortgage as required by Section 3409, Idaho Revised Codes.

Third: As said mortgages provided for the taking and using of the incomes, revenues, rents, issues and profits of the Great Shoshone and Twin Falls Water Power Company and to enjoy the income arising from property intended to be covered by said mortgages or deeds of trust by the mortgagor, contrary to law.

6.

That your petitioner should be allowed to intervene and plead to complainant's bill of complaint and set up his defenses and otherwise protect his rights. That your petitioner is informed and believes that unless he can have his claim settled out of the property which complainant claims is covered by its deed of trust and supplemental mortgages, that your petitioner's claim will be valueless.

Wherefore, Your petitioner prays that he be allowed to intervene herein and be made a party defendant.

JAKE M. SHANK.

By ALFRED A. FRASER,

His Attorney.

ALFRED A. FRASER, Solicitor.

(Duly verified.)

Endorsed: Filed Oct. 25, 1915.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ORDER FOR INTERVENTION OF JAKE M.
SHANK.

The request of said Jake M. Shank to intervene and be made a party defendant herein, having this day been made to the Court, and it appearing to the Court from the matters stated therein that said Jake M. Shank should be allowed to intervene and be made a party herein, and the Court being fully advised in the premises, *it is hereby ordered* that the said petition be granted and the said Jake M. Shank is hereby made a party defendant and is hereby permitted to plead herein and file his pleading in said cause on or before the.....day of October, 1915.

Dated this 25th day of October, 1915.

FRANK S. DIETRICH, Judge.

Endorsed: Filed Oct. 25, 1915.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ANSWER.

The intervening defendant, Jake M. Shank, now and at all times saving to himself all and all manner of benefit and advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in complainant's Bill of Complaint (hereinafter called "the Bill") and complainant's Supplemental Bill of Complaint (hereinafter called "the Supplemental Bill"), contained

for answer thereto, or to so much or such parts thereof as he is advised it is material or necessary for him to make answer to, and answering says:

1.

This defendant says:

(a) That leave to intervene in the above entitled case as a defendant and to file this answer in intervention has heretofore, before the filing hereof, been obtained from the above entitled Court.

This defendant says * * * * :

(The paragraphs here omitted are identical with the paragraphs in the joint answer of L. M. Plumer and F. B. Scull, executors of the estate of L. L. McClelland, deceased, set forth in this record, from paragraph one to paragraph nineteen inclusive and from paragraph twenty-three to the signatures of L. M. Plumer and F. B. Scull, excepting that where the terms defendants or correlative plurals are used the same appear in the singular in this answer.)

JAKE M. SHANK.

By ALFRED A. FRASER,

His Attorney.

20.

This defendant denies that the interests of Jake M. Shank, or of any other creditor are subject to interest of complainant herein, in so far as complainant claims a lien upon personal or mixed property by virtue of the said deed of trust and supplemental mortgages.

21.

And this defendant alleges that heretofore and prior to the commencement of this action by the Equitable Trust Company of New York, as trustees, against the Great Shoshone and Twin Falls Water Power Company, and long prior to the appointment of a Receiver herein, there had been pending in this Court an action brought by the said Jake M. Shank as plaintiff against the said Great Shoshone and Twin Falls Water Power Company, to recover the sum of Fifteen Thousand Dollars for personal injuries alleged to have been received by the said Jake M. Shank by and through the negligence and carelessness of the said Great Shoshone and Twin Falls Water Power Company, and that said action was compromised, and under the terms of said compromise the said Great Shoshone and Twin Falls Water Power Company agreed to pay to the said Jake M. Shank the sum of Eight Thousand Dollars in certain payments to be made from month to month, and that said Great Shoshone and Twin Falls Water Power Company has made to said Jake M. Shank payments under said agreement of compromise and there yet remains due and unpaid under said agreement to the said Jake M. Shank the sum of Four Thousand, Three Hundred Ninety Dollars, and that no part of this last mentioned sum has been paid. That said Jake M. Shank has filed his claim with the Receiver for said amount and said claim has been duly allowed and approved by the honorable judge of this Court to be a valid and liquidated claim against said Great Shoshone and Twin Falls Water Power Company in the

said sum of Four Thousand Three Hundred Ninety Dollars.

22.

This defendant alleges that at the time of the approval of said claim, and for some time prior thereto, since the 2nd day of November, 1914, all of the property of the said Great Shoshone and Twin Falls Water Power Company had been and now is, in the control and under the supervision of this Court, acting through said Receiver, William T. Wallace, and that this defendant has not now and has not had an opportunity to bring a suit upon this debt of the Great Shoshone and Twin Falls Water Power Company and obtain a lien by having a writ of attachment or other writ or process issued out of this or any other Court.

23.

This defendant alleges that said deed of trust as set forth in the Bill marked Exhibit "A", purports to cover and subject to its lien, real, personal and mixed property, but that neither the complainant nor its predecessors in interest, nor the Great Shoshone and Twin Falls Water Power Company, the mortgagor therein, or any one for them, ever caused said mortgage or deed of trust to be accompanied by the affidavit of the mortgagor; that said mortgage or deed of trust is or was made in good faith and without design to hinder, delay or defraud creditors; and that this defendant alleges that said mortgage or deed of trust is not, and has not been filed for record with the County Recorder of the counties where the personal and mixed property described therein was and is kept; and that the Recorder in said counties did

not and has not since indorsed on the back the time of receiving it, and did not and has not filed the same in his office, to be kept there for the inspection of all persons interested, and that said deed of trust was not entered in a book showing a minute of all mortgages of personal property as in such mortgages of personal and mixed property the statute, Sections 3408 and 3409, Idaho Revised Codes, provides.

(The paragraphs here omitted are identical with the paragraphs in the joint answer of L. M. Plumer and F. B. Scull, executors of the estate of L. L. McClelland, deceased, set forth in this record, from paragraph one to paragraph nineteen inclusive and from paragraph twenty-three to the signatures of L. M. Plumer and F. B. Scull, excepting that where the terms defendants or correlative plurals are used the same appear in the singular in this answer.)

JAKE M. SHANK.

By ALFRED A. FRASER,
His Attorney.

ALFRED A. FRASER, Solicitor.

(Duly verified.)

Endorsed: Filed Oct. 25, 1915.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

In Equity—No. 526.

MOTION.

Now comes the complainant and moves the Court as follows:

(a) To vacate and set aside the order made herein on the 25th day of October, 1915, allowing Jake

M. Shank to intervene and be made a party defendant in this cause, which said order was made *ex parte* and without notice of application therefor to complainant, for the reason that the petition for such order, filed by said intervener, is insufficient in law and in equity, and does not set forth facts sufficient to entitle said Jake M. Shank to intervene or be made a party defendant in said cause.

(b) To dismiss the petition of said Jake M. Shank to intervene and be made a party defendant herein, for the reason that the said petition is wholly insufficient in law and equity, and does not set forth facts sufficient to entitle said petitioner to intervene or be made a party defendant in said cause.

(c) To strike out what is denominated an answer, filed by or on behalf of the said Jake M. Shank, for the reason that it appears therefrom that said intervener has not such interest in this litigation as will entitle him to intervene or be made a party defendant in said cause, and the matters set forth in said alleged answer do not constitute a proper defense to complainant's bill of foreclosure, and the allegations therein contained do not set forth matter sufficient to disentitle complainant to the relief sought in the Bill.

MURRAY, PRENTICE & HOWLAND,
SULLIVAN & SULLIVAN,
RICHARDS & HAGA,

Solicitors for Complainant.

Endorsed: Filed Oct. 26, 1915.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

STATEMENT OF EVIDENCE UNDER EQUITY
RULE NO. 75.

Be it remembered that this cause came regularly on for trial before the Court, sitting in equity on the 25th day of October, 1915, on the Bill of Complaint and Supplemental Bill of Complaint of The Equitable Trust Company of New York, complainant herein, and the issues made thereon by the answers of Guy I. Towle, Carl J. Hahn, administrator of the estate of Harry M. King, deceased, defendants, and the answers of L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, interveners. Whereupon the following proceedings were had:

The Court overruled the motions of complainant, The Equitable Trust Company of New York, to strike out the answer of Guy I. Towle and to vacate the orders made by this Court on October 23rd and 25th, 1915, allowing L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, to intervene and be made parties defendant in this cause, and to dismiss the petitions and strike the answers of said interveners, L. M. Plumer and E. B. Scull, executors as aforesaid, and Jake M. Shank.

Thereupon the allegations in the answers of said defendants and interveners were by agreement of counsel in open Court deemed denied. The Court then directed William T. Wallace, as Receiver of the Great Shoshone and Twin Falls Water Power Company duly appointed in equity cause No. 509, pending

in this Court, to file his answer in this cause by 10 o'clock in the forenoon of October 26, 1915, and said Receiver within such time filed his answer as directed. The Clerk thereupon produced and opened in open Court the depositions of certain witnesses taken in New York before Harry Durning, notary public, pursuant to stipulation, and Mr. Haga proceeded to read the depositions, which were in substance as follows:

J. A. Allis, a witness sworn on behalf of the complainant whose deposition was taken as aforesaid on October 11, 1915, testified as follows:

Witness identified a document entitled, "Deed of Trust, Great Shoshone and Twin Falls Water Power Company to The Trust Company of America and James D. O'Neil, Trustees, dated May 1, 1910, \$10,000,000," which was marked "Complainant's Exhibit 1 for identification, October 11, 1915, testimony of Mr. J. A. Allis". Said Deed of Trust is signed by R. L. Kester, the vice-president of the Great Shoshone and Twin Falls Water Power Company, and William H. Leupp, the vice-president of The Trust Company of America, and James D. O'Neil, whose signatures appear thereon, and was duly sealed and acknowledged.

(The Deed of Trust referred to was over objection admitted in evidence and is identical with the copy thereof marked "Exhibit A" to the Bill of Complaint on file herein, excepting that said copy does not show recordation certificates and that the figures \$25.00 in the form of registered bond set out therein should be \$25,000.00.)

William K. Dunbar, a witness sworn on behalf of

complainant, whose deposition was taken as aforesaid on October 11, 1915, testified as follows:

Witness identified a document entitled, "Deed of Trust, Great Shoshone and Twin Falls Water Power Company to The Trust Company of America and James D. O'Neil, dated June 21, 1911," which was marked "Complainant's Exhibit 2, the testimony of Mr. William K. Dunbar, October 11, 1915"; and a document which begins, "Supplemental Mortgage, This indenture made and entered into this 7th day of April, in the year of our Lord, one thousand nine hundred and thirteen, by and between the Great Shoshone and Twin Falls Water Power Company, etc.," which was marked "Complainant's Exhibit 3 to the testimony of William K. Dunbar, October 11, 1915". These instruments are signed by the vice-president and secretary of the Great Shoshone and Twin Falls Water Power Company, whose signatures appear thereon and were duly sealed and acknowledged.

(The Deed of Trust and Supplemental Mortgages referred to were admitted in evidence and are identical with the copies set out in Exhibits B and C, attached to the Bill of Complaint of the complainant herein.)

Albert E. Smith, a witness sworn on behalf of the complainant, whose deposition was taken as aforesaid, on October 13, 1915, testified in substance as follows:

Witness has been the treasurer of the National Securities Corporation since prior to July 1, 1914. The National Securities Corporation is the owner of all of the outstanding bonds issued by Great Shoshone

and Twin Falls Water Power Company secured by the said Deed of Trust dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, in the aggregate principal amount of \$2,-230,000. The National Securities Corporation purchased these bonds in June, 1915, before their maturity and for value, from a protective committee for holders of notes of Great Shoshone and Twin Falls Water Power Company under agreement for refinancing dated June 27, 1914, and modification thereof, dated October 29, 1914, which committee consisted of Alvin W. Krech, H. Hobart Porter, A. C. Robinson and A. M. Imbrie. The Great Shoshone and Twin Falls Water Power Company has no interest in these bonds, and the title acquired thereto by the National Securities Corporation was an absolute title of ownership. Upon delivery of the bonds to the National Securities Corporation, value was paid therefor to the vendors above named. The National Securities Corporation is the present owner of the bonds which are now held by the Guaranty Trust Company as security for ten-year, six per cent gold notes of the National Securities Corporation under the terms of an agreement dated July 1, 1914. the original of which agreement is in the possession of the Guaranty Trust Company of New York. A true and correct copy of said agreement was identified and admitted in evidence marked "Exhibit E" to the testimony of Albert E. Smith, October 13, 1913. Article 4 of said agreement reads as follows:

"Upon any default in the payment of interest on or principal of any bonds, notes or other secu-

rities at any time comprised within the collateral or held as security for any of the collateral or upon any default under any mortgage or other instrument securing the same, or any part thereof, the Trustee shall have and may exercise all the rights of a holder of such bonds, notes or other securities for the enforcement thereof or of the security therefor."

Mr. Fraser: "If the court please, during the past few days I wasn't interested much and matters have come to my attention that I am not able to produce proof concerning, at the present time, but in hearing that deposition read, the parties stated that these bonds were first put up as collateral security to some notes, I believe, of the Great Shoshone Company, then that the National Securities Company purchased these bonds, but they nowhere say what they paid for them. I understand they got them for about twenty-five cents for each hundred dollar bond; that is by hearsay."

Mr. Haga: "Twenty-five dollars."

Mr. Fraser: "Was it twenty-five dollars? Well, a very small amount for the value of this bond, and the party who gives the deposition avoids stating in the deposition that they received anything of value for them, and the relationship existing between these parties who bought it in and the original holders is another matter, that if I had been as alert at the start of this suit as I have been for the last few days, I might have investigated a little more thoroughly."

Charles A. Platner, a witness sworn on behalf of

the complainant, whose deposition was taken as aforesaid on October 13, 1915, testified as follows:

Witness, bank clerk of Guaranty Trust Company of New York, having charge of documents held by Guaranty Trust Company of New York as trustee, produced certain bonds of the Great Shoshone and Twin Falls Water Power Company, being first mortgage, five per cent gold bonds secured by said Deed of Trust, dated May 1, 1910, and Supplemental Mortgages, aforesaid, dated June 21, 1911, and April 7, 1913, of which the registered bonds numbered from 1 to 48, inclusive, and being of par value \$25,000 each were identified and marked "Exhibit F to the testimony of Charles H. Platner, October 13, 1915;" and coupon bonds numbered from 1 to 1030, inclusive, of the par value of \$1,000 each with coupons number seven, due November 1, 1913, and subsequent coupons attached were identified by the witness and marked "Exhibit G to the testimony of Charles H. Platner, October 13, 1915." The said coupon bonds are identical with the form of the bonds which appear on pages 25 to 30, inclusive, of the Bill of Complaint in this cause, excepting that the serial numbers and the signatures are omitted. The registered bonds produced by the witness are identical with the form that appears on pages 30 to 33, inclusive, in the Bill of Complaint in this action, with the exception that the serial numbers and signatures are omitted and that in the upper right hand corner of the form of bond as it appears on page 30 the figures \$25.00 should be \$25,000.00. The form of the coupon bonds, as aforesaid, was marked "Exhibit G-a"

and the form of registered bonds, as aforesaid, and a copy of the bill of complaint in this cause were marked "Exhibit F-a."

(The exhibit referred to as "Exhibit F-a" was admitted in evidence and is identical with the Bill of Complaint herein; and the exhibits referred to as "Exhibits F, G, and G-a," were admitted in evidence and are identical with the form of registered and coupon bonds set out in the complainant's Bill of Complaint herein, subject to the corrections as noted above by the witness.)

The registered bonds numbered 1 to 48, inclusive, and marked "Exhibit F to the testimony of Charles H. Platner, October 13, 1915," are signed by the vice-president and secretary of the Great Shoshone and Twin Falls Water Power Company whose signatures appear thereon and are duly sealed with the corporate seal. The 1030 coupon bonds numbered 1 to 1030, inclusive, marked "Exhibit G" for identification to the testimony of Charles H. Platner, are signed by the proper officers of the Great Shoshone and Twin Falls Water Power Company whose signatures appear thereon and all of said bonds are duly sealed with the seal of said company. The Deed of Trust dated May 1, 1910, and marked "Exhibit 1 for identification to the testimony of J. A. Allis, October 11, 1915," is signed by the secretary of the Great Shoshone and Twin Falls Water Power Company whose signature appears thereon. (While the deposition recites that this witness produced the bonds referred to, before the Notary, they were not at-

tached to the deposition, nor were any bonds exhibited or offered in evidence at the time of the trial.)

Samuel Armstrong, a witness sworn on behalf of the complaint, whose deposition was taken as aforesaid on October 13, 1915, testified as follows: Witness is assistant secretary of the plaintiff.

The Equitable Trust Company of New York became the sole trustee under said Deed of Trust dated May 1, 1910, and Supplemental Mortgages aforesaid dated June 21, 1911, and April 7, 1913, The Trust Company of America having merged into the Equitable Trust Company of New York, and James D. O'Neil having been removed pursuant to the provisions of Article 13 of said Deed of Trust dated May 1, 1910, and as alleged in the Bill of Complaint of complainant herein. H. Hobart Porter, being, at said time, president of the American Water Works and Electric Co. All the said registered bonds marked "Exhibit F to the testimony of Charles H. Platner, October 13, 1915," are duly certified by the proper officers of the Trust Company of America, whose signatures appear thereon, and the records of The Trust Company of America show that such certification was on its behalf. The said coupon bonds marked "Exhibit G to the testimony of Charles H. Platner, October 13, 1915," are duly certified by the proper officers of The Trust Company of America and The Equitable Trust Company of New York whose signatures appear thereon, and the records of The Trust Company of America and The Equitable Trust Company of New York show such certification. The Deed

of Trust dated May 1, 1910, marked "Exhibit 1 to the testimony of J. A. Allis, October 11, 1915," is signed by the vice-president and assistant secretary of The Trust Company of America whose signatures appear thereon and duly sealed with the seal of said Company.

The witness thereupon read the certificates of recordation that appear on said Deed of Trust which show that it was recorded with the county recorder in the counties and in the manner as alleged in the Bill of Complaint of the complainant on file herein, but was nowhere filed or recorded as a chattel mortgage.

Exhibit A to the Bill of Complaint in this action is a true copy of the Deed of Trust dated May 1, 1910, with the exception that on page 30 the figures at the top of the form of bond should be \$25,000.00 instead of \$25.00, and with the further exception that the certificates of recordation do not appear on said copy, which was thereupon marked "Exhibit 1-a."

The witness then read the certificate of recordation that appeared on the Supplemental Mortgage dated June 21, 1911, marked for identification "Exhibit 2 to the testimony of William K. Dunbar, October 11, 1915," which showed that said mortgage was recorded in the county and in the manner as alleged in said Bill of Complaint, but was nowhere filed or recorded as a chattel mortgage. Exhibit B to the bill of complaint in this cause is a true and correct copy of said Supplemental Mortgage, with the exception that the recordation certificate does not

appear on said copy, which was thereupon marked "Exhibit 2-a." The witness then read the certificates of recordation that appear on the Supplemental Mortgage dated April 7, 1913, marked "Exhibit 3 to the testimony of William K. Dunbar, October 11, 1915," which showed that said Supplemental Mortgage was recorded with the county recorder of the counties and in the manner as alleged in the Bill of Complaint on file herein, but was nowhere filed or recorded as a chattel mortgage. Exhibit C to said Bill of Complaint is a true and correct copy of said Supplemental Mortgage with the exception that the recordation certificates do not appear on said copy, which was thereupon marked "Exhibit 3-a." Default has been made in the payment of the interest on said registered and coupon bonds as alleged in said Bill of Complaint and Supplemental Bill of Complaint and The Equitable Trust Company of New York has been requested to declare the principal of said bonds due and foreclose on said Deed of Trust dated May 1, 1910, and Supplemental Mortgages aforesaid, dated June 21, 1911, and April 7, 1913, as alleged in said Bill of Complaint herein, by instruments in writing from the Commonwealth Trust Company and American Water Works and Electric Company signed by H. Hobart Porter, president, and others, and from The Guaranty Trust Company of New York and National Securities Corporation.

Witness identified an instrument directed to Great Shoshone and Twin Falls Water Power Company and

William T. Wallace, as receiver of said company, which was marked "Exhibit K for identification to the testimony of Samuel Armstrong, October 13, 1915." This instrument was duly signed by the vice-president and assistant secretary of The Equitable Trust Company of New York whose signatures appear thereon and the copy thereof annexed to the Supplemental Bill of Complaint and marked "Exhibit A" is a true and correct copy and the same was marked "Exhibit K-a."

(The exhibits referred to as "Exhibits 1a, 2a and 3a" were admitted in evidence and are identical with the copies thereof marked "Exhibits A, B and C" to complainant's Bill of Complaint herein; and the exhibit referred to as "Exhibit K-a" was admitted in evidence and is identical with the copy thereof marked "Exhibit A" to complainant's Supplemental Bill of Complaint on file herein.)

Thereupon all exhibits attached to said depositions not theretofore introduced or admitted were offered and admitted in evidence.

William T. Wallace, a witness called on behalf of the complainant, testified as follows:

Witness has been receiver since November 2, 1914, and prior thereto since May 14th, 1914, was General Manager of the Great Shoshone and Twin Falls Water Power Company. All the property listed in the Amendments to the Bill of Complaint, on file herein, is in the ownership of Great Shoshone and Twin Falls Water Power Company, excepting a small parcel the

title to which is vested in the Shoshone Falls Power Company, the stock and bonds of which are held by Great Shoshone and Twin Falls Water Power Company. Besides the property described in what is termed Amendments to Bill of Complaint of this complainant, lodged with the Clerk of this Court Oct. 19, 1915, there is the stock and bonds of the Shoshone Falls Power Company, Limited, which may or may not have any value, and in addition the stock of the Jerome Water Works Company, Limited, a public ferry at Shoshone Falls and a miscellaneous assortment of materials and supplies of all kinds. This property is all located in the Snake River Valley in the State of Idaho. There has been about \$7,500 expended by the receiver in extensions. The company also owns one team of horses, a team of mules, wagons, three motorcycles, two automobiles and there are cross-arms and insulators stored at various points throughout the territory. Witness identified the minute book of the Great Shoshone and Twin Falls Water Power Company, and page 5 thereof, showing minutes of a special meeting of the Board of Directors of the Great Shoshone and Twin Falls Water Power Company, held at the office of the company at Pittsburgh, on July 1, 1910, was marked "Complainant's Exhibit 1", admitted in evidence, and by agreement of counsel the reporter made a copy thereof to be filed as the exhibit, which is in words and figures as follows:

“Mr. Van Wagener then presented the following resolution and moved its adoption:

“ ‘Whereas, it is necessary for this Company to borrow money for the purpose of purchasing, constructing and extending, completing and equipping its power development and power distribution system in the State of Idaho and for the general uses of this Company in the future development of its business.

“ ‘Now, therefore, be it resolved, that this Company issue and deliver its First Mortgage Five Per Cent Gold Bonds to an amount not exceeding the principal sum of Ten Million Dollars, such bonds to be of the denomination of One Thousand Dollars and Five Hundred Dollars, respectively, (provided that temporary printed bonds may be issued of the denomination of \$25,000 each) to be dated May 1st, 1910, and to be payable on the first day of May, A. D. 1950, in gold coin of the United States of America of the present standard of weight and fineness, to bear interest at the rate of five per cent. per annum from the first day of May, 1910, until said principal sum is paid, payable semi-annually on the first days of May and November in each year upon the presentation and surrender of the interest coupons thereto attached as they respectively mature, and to be subject to call and redemption on any interest payment date at par plus a premium of five per cent. of the par value and accrued interest.

“ ‘Both principal and interest of said bonds to be paid without deduction for any United States, State, County, Municipal or other tax or taxes

which this Company may be required to pay or retain therefrom under or by reason of any present or future law, such tax or taxes to be paid by this Company, such bonds to be authenticated by a certificate endorsed thereon by The Trust Company of America, Trustee, of the Mortgage or Deed of Trust securing the same, and,

“ *Be it further resolved*, that for the purpose of securing the payment of the principal and interest of said bonds this Company make, execute, acknowledge and deliver to The Trust Company of America of the City of New York and James D. O’Neil, of the City of Pittsburgh, Pennsylvania, a Mortgage or Deed of Trust conveying and transferring all and singular the property and other assets of this Company now owned and hereafter to be acquired upon the trusts, terms and conditions, and for the purposes therein provided, and that the President or Vice-President and Secretary or Assistant Secretary of this Company on its behalf make and execute all such bonds and make, execute, acknowledge and deliver such Mortgage or Deed of Trust, and

“ *Be it further resolved*, that the form of Mortgage or Deed of Trust as presented to this meeting, with the covenants and provisions therein expressed and the form of bond therein set forth, be approved and adopted by this meeting, and that the Secretary of this Company be appointed the attorney for this Company in its name and as and for its corporate act and deed, to acknowledge

said Mortgage or Deed of Trust before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment to the intent that the same may be duly recorded.'

"This resolution being duly seconded, it was unanimously adopted.

"Thereupon, on motion duly made and seconded, it was unanimously

" '*Resolved*, that the President of this Company be and hereby is authorized and directed to call a special meeting of the stockholders of this Company as soon as legally possible to take such action, upon the approval or disapproval of the foregoing resolution, and that the Secretary of this Company be authorized and directed to give the proper notice of said meeting as required by law and by the By-Laws of this Company unless the same shall be duly waived by the stockholders of this Company, and that no further action be taken in pursuance of the foregoing resolution unless and until the same shall have been duly approved by the stockholders of this Company."

The books of account of the Company show that no interest has been paid on the bonds since May 1, 1914. Pages 8 to 11, inclusive, of said Minute Book purport to be the minutes of a special meeting of the stockholders of the Great Shoshone and Twin Falls Water Power Company held at the office of the Company in Pittsburgh on July 1, 1910. A portion of these minutes was then marked "Complainant's Ex-

hibit 2", and by agreement of counsel the reporter made a copy thereof, to be filed as the exhibit, which was admitted in evidence and is in words and figures as follows:

"The Secretary thereupon read to the stockholders the Resolution adopted by the Directors of this Company at the meeting held the 1st day of July, 1910, authorizing the issue of the First Mortgage Five Per Cent. Gold Bonds of this Company to an amount not exceeding Ten Million Dollars, and the execution of a Mortgage or Deed of Trust to The Trust Company of America and James D. O'Neil for the purpose of securing the principal and interest of all of said bonds.

"Mr. Van Wagener thereupon presented the following Resolution and moved its adoption:

"*Resolved*—First: That the Stockholders of this Company in accordance with the direction of the Board of Directors hereby consent to and authorize the issue of the First Mortgage Five Per Cent. Gold Bonds of this Company to an amount not exceeding the principal sum of Ten Million Dollars, said bonds to be of the denomination and to be payable and to be secured in the manner set forth in the Resolution of the Board of Directors of this Company.

"2nd: That the proper officers of this Company be and hereby are authorized for and on behalf of this Company to execute and deliver to The Trust Company of America of the City of New York and James D. O'Neil of the City of

Pittsburgh, Pa., a Mortgage or Deed of Trust substantially of the form of the draught of said Indenture submitted to this meeting.

“ ‘3rd: That the proper officers of this Company be, and they are hereby authorized to execute, issue and deliver for and on behalf of this Company, the First Mortgage Five Per Cent. Gold Bonds of this Company to an amount not exceeding in the aggregate the principal sum of Ten Million Dollars under and in pursuance of a draught of the Mortgage or Deed of Trust submitted to this meeting, said bonds to be substantially of the tenor and effect set forth in said Indenture and to be issued in the manner and on the terms therein provided and to be equally and ratably secured thereby. The coupons attached thereto to bear the engraved facsimile signature of the Treasurer of this Company as in said Indenture provided.

“ ‘4th: That the proper officers of this Company be and hereby are authorized from time to time as required by the provisions and terms of said Indenture to mortgage or pledge all or any of the real or personal property that shall hereafter be acquired by this Company as security for the payment of the principal and interest of the bonds to be issued under and in pursuance of such Indenture.’

“This Resolution being duly seconded, it was unanimously adopted, and the Secretary was instructed to cast a ballot in its favor.”

Mr. Wallace on cross-examination by Mr. Hays testified as follows:

The books of account of the Company show that \$2,225,000 of Five Per Cent Bonds secured by the mortgage of May 1, 1910, were deposited with the Commonwealth Trust Company of Pittsburgh as collateral to an authorized issue of Six Per Cent. Notes of which notes \$1,713,500 only were sold or issued. The other \$5,000.00 of bonds, so far as the books show, are in the hands of the public.

On cross-examination by Mr. Martin Mr. Wallace testified as follows:

When witness became Receiver there was cash on hand \$7,590. Not over \$200 to \$300 of poles and other electrical equipment have been sold for cash. There is on hand not in excess of from \$1,500 to \$2,000 of electrical equipment, such as electrical ranges and articles sold usually to the general public consuming electricity. The Receivership has paid expenses and has enough cash on hand with which to pay taxes.

Mr. Wallace, on re-direct examination by Mr. Haga, testified as follows:

The books of the Company show that \$2,230,000 of the bonds were actually issued by Great Shoshone and Twin Falls Water Power Company. The books of the company also show an authorized issue of \$1,780,000 of notes mentioned above; all of these which were issued are outstanding, and that neither the principal nor the interest thereof has been paid, and the books of the Company do not show who owns these notes.

Mr. Haga: I wish to file at this time, if the Court please, the amendment which was served upon counsel some time ago, and which contains a description of the property testified to by the witness. The only purpose of the amendment is to particularly describe the property owned by the Company, and as is described generally in the original bill. Copies of the amendment were served some time ago or lodged with the clerk of this Court. It may be understood that the answer to the original bill may stand as answer to the amendment.

The Court: Very well.

Thereupon a copy of the Bill of Complaint filed by Guy I. Towle in this Court against the defendant, Great Shoshone and Twin Falls Water Power Company in equity cause No. 509 pending in this Court was marked "Plaintiff's Exhibit No. 3", admitted in evidence and the material parts thereof are in words and figures as follows:

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

GUY I. TOWLE, Complainant,

VS.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation,
Defendant.

In Equity—No. 509.

BILL OF COMPLAINT.

"The Complainant, Guy I. Towle, a citizen and resident of the State of Idaho, brings this bill on his own

behalf and on behalf of all creditors of the Great Shoshone and Twin Falls Water Power Company, who may hereafter join in the prosecution of this suit against the Great Shoshone and Twin Falls Water Power Company, a corporation, organized and existing under the laws of the State of Delaware, and a citizen of said State, and thereupon the Complainant complains and alleges as follows:

After the formal allegations, it is alleged as follows:

I.

That the Complainant is a resident and citizen of the State of Idaho, and of the District of Idaho, Southern Division, and resides in Lincoln County in said State.

II.

That the defendant is now, and at all the times hereinafter mentioned, was a corporation organized and existing under the laws of the State of Delaware, of which State it is a citizen, and having its statutory office at Wilmington, in said State, but has all of its property and carries on all of its business in the State of Idaho, where it is duly licensed to carry on such business, having its principal office and place of business in Twin Falls County, Idaho, and that all of its property and principal office in said State of Idaho are situated in the Southern Division of the District of Idaho.

III.

That the defendant, Great Shoshone and Twin Falls Water Power Company, was organized under

the laws of the State of Delaware on or about the 26th day of January, 1907, for the purposes, among others, of acquiring water powers, water rights and appropriations and other property and of acquiring and operating power stations and heating and lighting stations and their accessories and of dealing in water power, electrical power and electrical energy and apparatus, machinery and other property used or useful in connection therewith.

IV.

The Complainant is informed and believes and therefore alleges that the defendant has an authorized capital stock of One Million (\$1,500,000.00) Five Hundred Thousand Dollars, divided into fifteen (15,000) thousand shares of the par value of one hundred (\$100.00) Dollars each, all of which has been issued and is now outstanding.

V.

The Complainant is informed and believes and therefore alleges that on or about the 7th day of May, 1907, the defendant filed in the office of the Secretary of State of Idaho a duly authenticated copy of the Certificate of Incorporation and an acceptance of the Constitution and Laws of the State of Idaho, and a designation of an agent in said State; that thereafter, the defendant proceeded to acquire lands and water powers in said State of Idaho, and to conduct its business in said State; that the defendant is now the owner of various parcels of real estate located at and near Shoshone Falls, in the County of Lincoln, and others at and near Lower Salmon Falls in the

Counties of Gooding and Twin Falls, upon which are located power plants. It also owns water appropriations upon the Snake River at or near these points, and as well, an extensive distributing system whereby it supplies electric light, heat and power for domestic, commercial, irrigation and municipal purposes throughout that part of Southern Idaho east of and including Mountain Home and Grand View to Milner and Oakley.

VI.

That heretofore and on or about the 26th day of May, 1913, for moneys advanced to it, defendant made, executed and delivered to American Water Works and Guarantee Company, a corporation organized under the laws of the State of New Jersey, its demand promissory note dated on the said day, for the sum of Twelve Thousand (\$12,857.29) Eight Hundred Fifty-seven Dollars and Twenty-nine Cents, of which note Complainant thereafter became and now is the owner and holder, and that no owner or holder of said note ever was or is a citizen or resident of the State of Delaware; that payment of said note has been duly demanded and there is now due and owing thereon to Complainant the sum of Twelve Thousand (\$12,857.29) Eight Hundred Fifty-seven Dollars and Twenty-nine Cents, with interest at the rate of Six (6%) Per Cent. per annum from May 26th, 1913.

VII.

That the Complainant is advised and believes and therefore alleges that the property of the defendant

consists of certain bills and accounts receivable, amounting in the aggregate to not exceeding One Hundred (\$140,000.00) and Forty Thousand Dollars, whereof, however, a large part is of doubtful collectibility; cash on hand or in bank not exceeding Five Thousand (\$5,000.00) Dollars; and real estate, lands, power stations, water appropriations, distributing system and equipment of large actual and potential value; that Complainant is informed and believes and therefore alleges that the value of the property of defendant, if properly conserved and continuously operated, is greatly in excess of the amount of its liabilities; that said properties are at the present time profitably operated and produce a considerable income in excess of the cost of operation, and that the continued operation of its property is essential to the preservation of its value and in the public interest, and will result in an enhancement of the value of its assets.

VIII.

The Complainant is further informed and believes and therefore alleges that the defendant has made heavy expenditures for the increase of its plant and equipment and has become heavily indebted therefor; that it is also indebted for supplies furnished in connection with its operation; that on account of the present conditions existing throughout the financial centers of the United States, due to the war now raging in Europe and other causes, the defendant has been and is now unable to obtain further credit or borrow further funds; that payment of moneys ow-

ing to the defendant has been delayed by the persons owing the same, and that more than Ninety Thousand (\$90,000.00) Dollars, due from companies to whom power has been furnished for pumping water for irrigation, are not collectible at the present time; that under these circumstances and because thereof, and for other reasons, a situation has resulted where the defendant, notwithstanding the great value of its properties, is and will be unable to meet its obligations and the interest thereon as they mature and become payable.

IX.

The exact amount of the indebtedness of the defendant is unknown to Complainant, but the Complainant is informed and believes and therefore alleges that the amount of said indebtedness is substantially as follows:

\$2,340,000.00 of First Mortgage Five Per Cent. Gold Bonds issued under and secured by a mortgage dated May 1, 1910, to the Trust Company of America, and James D. O'Neil as Trustee, which said bonds are dated May 1, 1910, and are payable May 1, 1950. Of said First Mortgage Bonds, \$115,000.00 are outstanding in the hands of third parties, and the remainder, viz., \$2,225,000.00 in principal amount, are pledged as collateral to issues of the Company's Six Per Cent. Coupon Notes which have been issued and are outstanding to the amount of \$1,780,000.00. Said notes are of two issues, each secured by the deposit of First Mortgage Bonds of the Company under a collateral trust indenture to the Commonwealth

Trust Company of Pittsburgh, as Trustee. Of said outstanding Six Per Cent. Coupon Notes, \$155,000.-00 in principal amount became due and payable August 1, 1914, and are overdue and unpaid, and \$16,000.00 in principal amount became due November 1, 1914, and are overdue and unpaid, and an installment of interest upon certain of said notes, aggregating in principal amount \$48,750.00, fell due November 1, 1914, and still remains unpaid; and the defendant has refused payment of said notes and interest and is in default in the payment thereof.

Complainant is informed and believes and therefore alleges that the defendant is further indebted upon notes and accounts payable to an amount in excess of \$1,300,000.00, including the note held by Complainant, the greater portion of which is past due.

X.

The complainant is further informed and believes, and therefore alleges that many creditors of the defendant are pressing defendant for payment of their claims, and there is great danger that the said creditors will bring suits upon the same to attach the property of the defendant and levy execution and in various ways enforce their respective claims; that unless this Court, in view of the financial embarrassment of the defendant as aforesaid, will deal with the property as a single trust fund and take it into judicial custody for the protection of every interest therein, there is great danger that the properties of the defendant may no longer be operated as a con-

tinuous system and enterprise; that action on the part of the creditors will result in judgments, executions and seizures by sheriffs or other like officers, and forced sales of the property of the defendant and interruption of the business of the defendant; that individual creditors will assert their remedies in different Courts; that conflicts between creditors and between Courts will be promoted; that a vast and unnecessary multiplicity of suits will result and that a great and irreparable injury and loss will be caused to the defendant and to its creditors; that should any of the creditors of the defendant succeed in the enforcement of their claims and thereby compel the defendant to suspend its business and become inactive, irreparable injury, damage and loss will be caused, not only to all the creditors of the defendant but to the public and to the communities and municipalities and the residents thereof to which defendant is now engaged in the supply of electric current for lighting, heating and power purposes; that the defendant and its properties may be placed in a position where it will be impossible to continue its development and comply with the orders of the Public Utilities Commission of the State of Idaho; that waste and loss can be avoided and property preserved for the service of the public and for the equitable benefit of all of those interested therein, only by the intervention of a court of equity and the granting of equitable relief, including the appointment of a Receiver.

XI.

That under these circumstances, the intervention of a court of equity is imperatively required for the protection of the rights of the complainant and of all other parties in interest, especially for the timely appointment of a receiver to take charge of and preserve the property of the defendant, continue the operation of its undertaking, and collect and receive and properly appropriate the income thereof until the final decree of the Court in the premises.

XII.

That this is a civil suit in the nature of a claim in equity and the matter in dispute exceeds, exclusive of interest and costs, the sum of Five Thousand (\$5,000) Dollars.

XIII.

Inasmuch as the Complainant has no adequate remedy at law for his aforesaid grievance and can have relief only in equity, the complainant files this bill of complaint on behalf of himself and all other creditors of the defendant who may come in and contribute to the expenses of the suit and prays for equitable relief as follows:

(1) That the rights of the Complainant and of all other creditors of the defendant may be ascertained and decreed, and that the Court fully administer the property and funds in which the complainant is interested, and for such purpose marshal all the assets of the defendant and ascertain the several and respective liens and priorities existing thereon,

and enforce and decree the rights, liens and equities of the creditors of the defendant as the same may be finally ascertained by the Court.

(2) That the Court forthwith appoint a receiver of all and singular the property and assets operated, held, owned or controlled by the defendant, including its land, and all equipment, materials, machinery, supplies, book accounts, choses in action, and assets of every description, wheresoever situated, belonging to the defendant, with full power and authority to take the same into his possession, and to hold, manage and operate the same, and to conduct the business now being conducted by the defendant; to collect and receive all the earnings, rents, issues, profits and income thereof, and to apply the said receipts under order of decree of the Court for such period as the Court shall order; with all the incidental powers ordinarily vested in receivers in like cases and with such additional powers as the Court may from time to time grant, and to incur such expenses as may be necessary or advisable for labor, supplies and materials, or otherwise, in connection with the administration of the assets and property of the defendant.

(3) That all creditors and stockholders and other persons be enjoined from instituting or prosecuting or continuing the prosecution of any actions, suits or proceedings at law or in equity or under any statute against the defendant in any Court, wheresoever situated, and from levying any attachments, executions or other processes upon or against

any of the properties of the defendant, or from taking or attempting to take into their possession the property or any part of the property of the defendant, and that the defendant, and its officers, directors, agents and employees, and all other persons, be enjoined and restrained from interfering with or hindering the taking into possession of the defendant's property by the said receiver and from transferring, selling, or disposing of any of the property or income of the defendant, or attempting to sell or dispose of the same in any manner.

(4) That at such times as may be found just and proper the properties of the defendant may be ordered to be sold as an entirety or in such parcels and at such places and in such manner and upon such terms and conditions as this Court shall deem just and equitable, and the proceeds of any such sale be distributed among those entitled thereto, or that the properties of the defendant, after satisfaction of the claims of creditors, may be returned to it, or that such other action may be taken in respect thereto as to the Court may seem proper, and as may be necessary to fully protect and enforce the rights and equities of the Complainant and of all other creditors of the defendant and other parties in interest.

(5) That this Court will grant unto the Complainant a writ of subpoena directed to the defendant, requiring the defendant to appear before this Court on a certain day therein named, and then and there to answer all and singular the matters therein set forth (but not under oath, an answer under oath

and that it is necessary that a receiver of the defendant and its property should be appointed forthwith and with powers herein granted; it is, after consideration, hereby

Ordered, adjudged and decreed that William T. Wallace, of Twin Falls, in the State of Idaho, be and he hereby is appointed receiver of this Court of the defendant Great Shoshone and Twin Falls Water Power Company and of all and singular the property, lands, plants, system, franchises, rights, claims, interests and assets of the said defendant of every name and nature and wheresoever situated, and he is hereby authorized forthwith to take possession thereof and to preserve, manage, operate and use the same and to conduct and carry on the operation of the hydro-electric power system and other business and properties of the defendant in such manner and to such extent as in his judgment is necessary and desirable and to exercise all authority, franchises and privileges of the defendant. The said receiver is authorized and directed to collect all moneys and other properties due and to become due to said Great Shoshone and Twin Falls Water Power Company; to institute and prosecute such suits in his own name as receiver or in the name of the Company or otherwise as he may be advised or as may be now pending in behalf of the Company, and to defend such suits as may be brought against him and those now pending or hereafter brought against the defendant which affect or may affect the property, rights and franchises of which he is or may become receiver.

Said receiver is also authorized and is hereby given full power and authority in his discretion to appoint and employ such agents, attorneys, officers, managers and employees as shall be necessary to aid him in the proper discharge of his duties; and it is

Further ordered, adjudged and decreed that the defendant and all persons, firms and corporations in possession of any of the property of the defendant forthwith deliver the same to the receiver; and the said defendant and the officers, directors, agents, attorneys and employees thereof and all other persons, firms and corporations whatsoever are hereby restrained and enjoined from interfering with, attaching, levying upon, seizing or in any manner whatsoever distributing any portion of the properties, rights and franchises of the defendant, or taking possession thereof or in any manner interfering with the same or any part thereof without the consent of the receiver, and from interfering in any manner with or preventing the discharge by said receiver of his duties or his operation and management of said properties and premises under the order of this Court; and it is

Further ordered, adjudged and decreed that the said receiver shall retain possession and continue to discharge the duties and trusts aforesaid until further order of this Court in the premises and that he shall from time to time apply to this Court for such other and further order and direction as he may deem necessary and requisite to the due administration of said trust; and it is

Further ordered, adjudged and decreed that within five days from the date of this order the said receiver shall execute and file with the Clerk of this Court a bond with one or more sureties, approved by this Court in the penal sum of Twenty-five Thousand Dollars (\$25,000), conditioned upon the faithful discharge of his duties, and to account for all funds coming into his hands and to abide by and perform all things which he shall be directed by the Court to do.

Dated November 2, 1914.

FRANK S. DIETRICH,
District Judge.

Thereupon the answer filed by Great Shoshone and Twin Falls Water Power Company in said equity cause No. 509 was marked "Plaintiff's Exhibit No. 5", admitted in evidence, and is in words and figures as follows:

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

GUY I. TOWLE, Complainant,
vs.

GREAT SHOSHONE AND TWIN FALLS WA-
TER POWER COMPANY, Defendant.

ANSWER.

Great Shoshone and Twin Falls Water Power Company, the defendant in this cause, for Answer to Bill of Complaint herein, or unto so much and such parts thereof as the defendant is advised that it is necessary or material for this defendant to make answer unto, answering says:

First: Defendant admits each and every allegation of the said Bill of Complaint as therein set forth or specified.

Second: The defendant joins in the prayer of the said Bill of Complaint.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY.

By (Signed) IRVING E. JOSLYN, Vice-President.
P. B. CARTER,

Solicitor for Defendant.

Residence: Boise, Idaho.

Before the complainant rested and closed its case, and upon the coming in of the Court on the morning of October 27, 1915, Mr. P. B. Carter stated to the Court that he had been out of town for a few days and had just returned that morning; that a telegram had come to his office at 3:50 P. M., October 26, 1915, from H. Hobart Porter, President of the Great Shoshone and Twin Falls Water Power Company, requesting him to file an answer in this case on behalf of the Great Shoshone and Twin Falls Water Power Company, admitting all the allegations of the foreclosure bill and the supplemental bill Mr. Carter further stated to the Court that he had prepared an answer in pursuance of the telegram from Mr. Porter, and desired leave to file the same; that thereupon the Court took the application under advisement and suggested that the proposed answer be lodged with the clerk; said answer is as follows:

“Comes now the defendant, the Great Shoshone and Twin Falls Water Power Company, one of the de-

endants in the above entitled action, and answering the bill of complaint and the supplemental bill of complaint admits each and every allegation of said bill of complaint and the supplemental bill of complaint as therein set forth or specified."

Thereafter, to-wit, on the 3rd day of March, 1915, an order was entered denying said application.

On behalf of the defendant, Carl J. Hahn, Mr. Wise offered in evidence a certified copy of the judgment in the case of Carl J. Hahn, administrator of the estate of Harry M. King, deceased, vs. Great Shoshone and Twin Falls Water Power Company, to the introduction of which Mr. Haga objected on behalf of The Equitable Trust Company of New York, on the ground that it was irrelevant and immaterial, which objection was by the Court overruled *pro forma*, and said paper was thereupon marked "Defendant's Exhibit No. 1."

(The judgment referred to was admitted in evidence, and is identical with the copy thereof marked "Exhibit A" attached to the answer of Carl J. Hahn, on file herein.)

No further evidence was introduced on behalf of any of the defendants or intervenors, and Mr. Haga made the following admissions on behalf of The Equitable Trust Company of New York:

That the claims of Jake M. Shank in the sum of \$4,390.00, Guy I. Towle in the sum of \$13,963.01, and L. M. Plumer and E. B. Scull, executors as aforesaid, in the sum of \$15,625.00, have been allowed and

approved as claims against the Great Shoshone and Twin Falls Water Power Company in the general creditors' suit, wherein Guy I. Towle is plaintiff and the Great Shoshone and Twin Falls Water Power Company is defendant, being equity cause No. 509 pending in this Court.

That the Deed of Trust dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, were recorded in the mortgage records of the several counties as alleged in the Bill of Complaint of the complainant on file herein and were not recorded in what is known as the Chattel Mortgage Record.

Before settling the statement, counsel for appellant expressly waived its last assignment of error (number 15) and therefore the statement is not made complete relative to the point therein involved.

DIETRICH, Judge.

ORDER SETTLING STATEMENT.

The within and foregoing statement of evidence, being tendered to me for settlement and allowance, and it appearing to me that said statement, together with objections and amendments thereto, were presented to the Court pursuant to stipulation of all parties, and upon consideration of said objections and amendments and the statement having been duly engrossed with such amendments,

IT IS CERTIFIED, that said statement is in all respects true, complete, correct, properly prepared and contains a full transcript of the evidence reduced

to narrative form pertaining to the issues raised by the Assignment of Errors.

Dated this 12th day of April, 1916.

FRANK S. DIETRICH,
District Judge.

Endorsed, filed April 19, 1916.

W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause.)

In Equity—No. 526.

DECISION.

DIETRICH, DISTRICT JUDGE:

Two general questions are presented: (1) For what amount is the plaintiff entitled to foreclose; and (2), upon what property? That bonds of the face value of \$2,230,000.00 were duly certified, and later issued for value, and are now outstanding, is admitted. It is further admitted that no part of the principal thereof has been paid, and no interest subsequent to the coupons maturing May 1, 1914. These facts constitute a prima facie showing of an indebtedness of \$2,230,000.00, besides interest thereon at the rate of five per cent from May 1, 1914. Upon the other hand, there is evidence tending to show, and sufficient, I am inclined to think upon which to base a finding, that nearly all of the bonds were issued, not absolutely, but as collateral only. There being no competent evidence that the collateral character of the holding has changed to absolute ownership, the question presented is, whether an unqualified decree

should go for the full face value of the bonds. At the oral argument it was urged that it was the right and duty of a trustee to foreclose for the full amount of the bonds which it has certified, regardless of the question whether or not the debtor has put them into circulation. No authorities have been cited in support of this view, and being unable to appreciate the reasoning upon which it is based I must decline to accept it. A bond does not become an obligation of the debtor until it is issued, and it is issued when, and only when, a third party acquires some right or interest therein. True, there need not be an absolute sale; a bond is issued as well when it is put out as collateral. But to be issued there must be an alienation of some interest therein or the creation of some lien thereon. While the trustee is not bound to show to whom bonds have been issued, or by whom they are presently held, it must assume the burden of showing how many have been issued and are outstanding, for the aggregate of the outstanding bonds is the measure of its maximum recovery. The real, and, as it seems to me, the only serious, question upon this branch of the case is whether the capacity in which outstanding bonds are held may be made an issue prior to decree and sale. The trustee says no, and directs my attention to certain cases, which, while tending to support its view, are seemingly far from being conclusive. It is to be noted that it is not a question merely of what presumptions may be indulged or of the burden of proof, or the weight of evidence. If the trustee's contention is sound, it is in-

competent for the debtor to raise such an issue at all, and evidence offered by it to show that bonds were issued only as collateral, and that the amount for which they are held is less than their face, is not receivable. Nor is it a question of the character or amount of the relief to which the collateral holder is entitled. Upon the one hand, the trustee concedes that upon the distribution of the proceeds of sale the collateral holder cannot demand an amount in excess of the actual indebtedness due him, and upon the other hand it is doubtless true that up to the amount of such claim, and until it is fully discharged, he is entitled to share ratably with other bondholders upon the basis, not of the amount of his claim, but of the face value of the bonds. But if offered by the debtor can the issue touching the just amount of the collateral claim be ignored? There are logical and practical objections of the most serious character to the trustee's position. It here prays for a judicial determination of the amount of the indebtedness secured by the trust deed and for a sale of the property to pay the same. Admittedly the maximum of the debtor's obligation, where its bonds are held as collateral only, to secure notes which it has executed, is the face of the notes and not of the bonds. How then can the court by its decree declare that the amount due is the full face of the bonds? It is urged that the matter can be controlled upon the distribution of the proceeds of sale, but, aside from the illogical aspect of such procedure, suppose the debtor desires to avoid a sale, and is able to raise the amount of money it ac-

tually owes, but no more, within the period usually granted to it under the practice, before a sale can be made. Is it to be permitted to discharge its just obligation and thus save its property? And, if so, how, in the face of the decree, is the amount of the actual indebtedness to be ascertained? Are the conditions at such a time any more favorable for the determination of the issue than they were before the entry of a decree? The parties before the Court are the same. The pertinency of these inquiries is emphasized by portions of complainant's prayer. Referring to the supplemental bill, where the relief sought is more comprehensively and particularly stated, we find that it prays "that the Court find and adjudge that the principal of the said bonds issued and outstanding as alleged in the bill of complaint herein, in the amount of \$2,230,000.00, is due and payable," etc. And again: "That an account be had and taken of the bonds, interest coupons, and interest secured by said deed of trust and supplemental mortgages, and the amount due thereon, with the names of the lawful holders or owners thereof, be ascertained; that an account be taken of all property of every kind conveyed or pledged by said deed of trust and supplemental mortgages or intended so to be, whether acquired before or after the execution and delivery thereof." And again: "That the defendant, Great Shoshone and Twin Falls Water Power Company, and William T. Wallace as receiver of its property, may be decreed to pay, within a short time to be fixed by the court, to the holders of the bonds and

coupons secured by said deed of trust and supplemental mortgages, or to your orator as trustee for said holders, the principal amount of said bonds and the defaulted interest thereon," etc.

Again, upon what basis is redemption from sale to be made if the property goes to sale, and is there to be a personal judgment over, for the entire difference between the face of the bonds and the proceeds of the sale, pursuant to the usual provision of a foreclosure decree? If so, manifestly the debtor will thus be adjudged to pay in excess of the amount of its actual debt.

While leaning toward the view that the issue may properly be presented and tried at this juncture of the proceeding, I am under the circumstances disposed to yield to the plaintiff's suggestion, that it be reserved, with the understanding that the decree shall contain appropriate qualifications and provisions guarding against injustice and against prejudice to rights which might otherwise be foreclosed. The debtor is making no defense, and, being insolvent, it is quite apparent that it has no expectation of either avoiding the sale or causing a redemption to be made therefrom. Hence no serious practical difficulties need be anticipated.

The second question arises out of the fact that the trust deed, which, under the laws of the state, is to be deemed a mortgage, is executed with the formalities only of a real estate mortgage, and is without certain requirements for, and is not recorded as, a chattel mortgage. By intervening creditors and by

the receiver it is urged that as to the personal property which the instrument purports to cover, it is void; or perhaps, speaking more accurately, it is to that extent ineffective as against the claims of other creditors. In support of this view reliance is placed upon Section 3408 of the Idaho Revised Codes, which declares that: "A mortgage of personal property is void as against creditors of the mortgagor . . . unless . . . it is accompanied by the affidavit of the mortgagor that it is made in good faith," etc. Admittedly no such affidavit was attached to or accompanies the trust deed. Against this defense the first point raised by the plaintiff is, that neither the intervening creditors nor the receiver is competent to interpose it. The argument is that the receiver stands in the shoes of the debtor, and can make no defense unavailable to it, and that the instrument being undoubtedly valid as between the mortgagee and the mortgagor, is valid as between the mortgagee and the receiver. And further, that the intervening creditors having no judgment or other lien upon, or interest in, any of the property, are without standing as parties, and cannot be heard to question the validity of the mortgage. It must be conceded that as a rule a general creditor without interest in or a lien upon mortgaged property cannot intervene in a foreclosure suit or challenge the sufficiency of the mortgage. But here, it is to be observed, a creditors' suit was brought long before the institution of the foreclosure suit, and a receiver was appointed therein to take charge of all of the mortgagor's property.

In that suit the claims of these creditors were offered, allowed, and filed, as valid subsisting claims against the estate. In *Chemical National Bank vs. Armstrong*, 59 Fed. 372, 375, where a receiver had been appointed to take charge of the assets of an insolvent bank, Judge Taft, delivering the opinion of the court, said:

“It is manifest that it would utterly defeat the object of the banking act if, after the suspension, the assets remained subject to levy, execution, or attachment and, therefore, that the passing of the assets into the hands of the receiver removes all the property of the bank from liability to process to secure satisfaction of judgments. *Bank vs. Colby*, 21 Wall. 609.

“The right which a creditor of the bank had before suspension of levying an execution to satisfy his judgment is gone, and for it is substituted a fixed and definite interest in the assets as a security for the payment of his debt, which it is the purpose of the banking act to reduce to money, and apply on his debt, with all convenient speed.”

Referring to this case, the Supreme Court of the United States, speaking through Mr. Chief Justice Fuller, in *Merrill vs. Bank*, 173 U. S. 131, 136, said:

“This was in accordance with the decision of the circuit court of appeals for the Sixth circuit, in *Chemical National Bank v. Armstrong*, 16 U. S. App. 465, Mr. Justice Brown, Circuit Judges Taft and Lurton, comprising the Court. The

opinion was delivered by Judge Taft, and discusses the question on principle with a full citation of the authorities. We concur with that court in the proposition that assets of an insolvent debtor are held under insolvency proceedings in trust for the benefit of all his creditors, and that a creditor, on proof of his claim, acquires a vested interest in the trust fund."

Recognizing the same principle, the Supreme Court of California, in *Ruggles vs. Cannedy*, 127 Cal. 290, gave it specific application to conditions analogous to those here presented. It is there said:

"In this case, the creditors had not obtained judgments against the mortgagor, nor indeed had they instituted any proceedings against him at the time he was adjudged insolvent. After that judgment by force of the insolvency act itself, they were prevented from resorting to any proceeding in law or equity for such purpose. They were limited to the presentation of claims in the insolvency court. This they did, and when these claims were allowed and approved the questions involved in them became *res adjudicata*. The presentation, allowance and approval of the claim, while not in strictness a judgment, had much of the force and effect of a judgment, and was the only thing in the nature of a judgment which creditors so situated could obtain. For the purpose of enforcing their rights against fraudulent or void acts of the insolvent, it is the equivalent of a judgment. (Roan v. Winn, 93 Mo. 503)."

Only by giving effect to such principle can great injustice be avoided, for otherwise, at the suggestion and with the encouragement of the trustee, a general creditor could bring such a suit as was here brought, and secure the appointment of a receiver, and the property having thus been placed *in custodia legis*, other general creditors would be prevented from acquiring specific liens thereon through the levy of attachment or execution process, with the result that they would be disabled from attacking an invalid mortgage, while the trustee, taking advantage of their disability, could rest secure until, upon the maturity of its right to foreclose, it could appropriate the entire property to the discharge of its claim, notwithstanding the defect in its mortgage. It will therefore be held that the creditors were properly permitted to intervene, and that they have an interest which entitles them to challenge the mortgage.

The further contention is made by the trustee that the provisions of the chattel mortgage statutes of the state are not applicable to property such as is here involved, for the reason that, while some of it, considered separately, falls within the definition of personal property, it is all to be deemed a single indissoluble unit because of its necessary relation to the public purpose to which it is devoted. Within certain limits the view finds support in *Hammock v. Farmers Loan & Trust Co.*, 105 U. S. 77, and *Farmers Loan & Trust Co. v. Detroit, etc., R. R. Co.*, 71 Fed. 29. See also *Jones on Corporate Bonds and Mortgages*, (3d Ed.), Section 137 *et seq.* While this

is not a railroad property, it is devoted to the public service, and I am inclined to think it is subject to the same considerations which were regarded as controlling in these cases; in the absence of a decision of the Supreme Court of the state to the contrary I shall therefore apply the principle which they establish to the determination of the issue here. It may be added that the decisions of the state courts, where there are no controlling statutes, are wanting in harmony, with the weight probably against the view here adopted.

Complying with the suggestion made at the hearing, counsel for the interveners have incorporated in their brief a schedule in which specifically or generally they have inventoried what they deem to be personal property. By section 3054 of the Idaho Revised Codes, real property or real estate is defined as embracing lands, mining claims, possessory rights to lands, ditch and water rights, and everything affixed or appurtenant to lands. Under this definition it is not apparent how the several water rights included in the list can be held to be personal property: But however that may be, they clearly fall within the principle of the Hammock case. So also do franchises, and such items as generators, dynamos, switch boards, and other articles of equipment (constituting essential parts of the mortgagor's generating, transmitting, and distributing system); also tools, implements, and materials, teams and conveyances, presently necessary for the maintenance, repair, and operation of the system.

The principle, however, does not extend to supplies, materials and tools in excess of present needs; to bills or accounts receivable; to cash on hand or bank balances; to stocks of merchandise which are intended for sale to the public in the ordinary course of retail business; and apparently not to the capital stock of the Jerome Water Works Company, or to the public ferry at Shoshone Falls; nor, generally speaking, to such articles of personalty as do not form constituent parts of the system, or are not presently necessary to its maintenance and operation—as to all of which the claims of the interveners will be recognized as being superior to the lien of the mortgage. The other property will be sold as a single parcel, but these items upon which it is held the creditors have a superior lien will be sold separately. Either party may, upon notice, introduce further evidence, at a date to be stated in the notice, prior to December 10, 1915, for the purpose of more completely identifying the property embraced in this latter class.

Endorsed, Filed Nov. 17, 1915.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

STIPULATION.

IT IS HEREBY STIPULATED by and between the parties hereto, that in view of the decision of the Court that the lien of complainant's mortgage is, as to certain personal property, subject and subordinate to the claims of certain of the defendants and the in-

terveners, and in view of the further fact that it is to the interest of all parties to this suit and creditors of the Great Shoshone and Twin Falls Water Power Company that all the property, rights and assets of said corporation be sold as an entirety and without delay, the decree in this cause shall provide for the sale of all of the property of the said defendant Great Shoshone and Twin Falls Water Power Company in block and as an entirety, but the sale of said premises shall not be construed as a waiver of the right of appeal of any party to this cause as to any matter relating to the distribution of the proceeds of sale, or as to any matter involved in the decision of the Court rendered herein on the 17th day of November, 1915, but all objections that might be raised on an appeal from the decree herein may be raised with the same force and effect on an appeal taken after the sale of such property under said decree.

RICHARDS & HAGA,

Solicitors for Complainant.

P. B. CARTER,

Solicitor for Defendant, Great Shoshone and Twin Falls Water Power Company.

S. H. HAYS,

Solicitor for Receiver.

KARL PAINE,

MARTIN & CAMERON,

Solicitors for Defendant, Guy I. Towle.

JAMES H. WISE,

Solicitor for Defendant, Carl J. Hahn.

MARTIN & CAMERON,

Solicitors for L. H. Plumer and E. B. Scull, Executors of Estate of L. L. McClelland.

ALFRED A. FRASER,

Solicitor for Jake M. Shank, Intervener.

Endorsed, Filed Dec. 6, 1915.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

In Equity—No. 526.

DECREE OF FORECLOSURE.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED and DECREED, as follows, viz:

First.

That the Deed of Trust or Indenture of Mortgage, dated May 1st, 1910, made, executed and delivered by the defendant, Great Shoshone and Twin Falls Water Power Company (hereinafter sometimes called the "Power Company") to The Trust Company of America, of the City of New York, State of New York, and James D. O'Neil, of the City of Pittsburg, State of Pennsylvania, as Trustees, and the Supplemental Mortgage or Indenture dated the 21st day of June, 1911, made, executed and delivered by the Power Company to the said The Trust Company of America and James D. O'Neil, as Trustees, and the Supplemental Mortgage dated April 7th, 1913, made, executed and delivered by the Power Company to The Equitable Trust Company of New York, complainant herein, and the said James D. O'Neil, as Trus-

tees, which said Deed of Trust or Indenture of Mortgage and Supplemental Mortgages and Indentures are sought to be foreclosed in this action, and the bonds issued thereunder, to-wit: Registered bonds numbered 1 to 48, inclusive, of the denomination of \$25,000.00 each, and coupon bonds numbered 1 to 1030, inclusive, of the denomination of \$1,000.00 each, are legal, valid and binding obligations of the Power Company; and the said Deed of Trust and Indenture of Mortgage and the said Supplemental Mortgages securing the said bonds are first and paramount liens, prior and superior to all other liens, encumbrances, right, title, interest, claim or demand of any of the parties defendant herein, and of any other person or persons who may be bound by this decree, except as hereinafter expressly provided and decreed, upon all the property, whether real, personal, or mixed, of the Power Company whensoever acquired, including the lands, premises, properties, rights, powers, privileges, and franchises more specifically described as follows, to-wit:

(There is here omitted a specific description of power sites, stations, sub-stations, other lands, buildings, transmission lines, franchise, water permits and rights, as set forth in the Amendments to the Bill of Complaint of the Complainant herein, and followed by the general description in the following paragraph.)

And generally all other rights and property of the Power Company now owned or in the process of acquisition, and whether real, personal or mixed, in-

cluding all power and other plants, water permits and rights, appropriations of water, dams, reservoirs, flumes, canals, tunnels, race ways, controlling works, water frontage, power sites, ferries, machinery, transmission and distributing lines, poles, wires, cables, telephone and telegraph lines, terminal properties, stations, sub-stations, docks, yards, machine shops, weirs, water wheels, office buildings, structures, tenements and hereditaments and appurtenances, bridges, boats, rolling stock, rights of way, dynamos, convertors, transformers, generators, switch boards, arresters, circuit breakers, meters, equipment, machinery, tools, implements, apparatus, and appliances, stores, dwelling houses, sub-ways, conduits, fixtures, supplies, furniture, chattels, stocks, bonds, certificates of interest, and other securities, choses in action, privileges, franchises, immunities, easements, accounts receivable, claims or demands due and owing to the Power Company, appurtenances, possessions, rights, tolls, rents, revenues, issues and profits, and also any and all estate, right, title and interest, property, possession, claim and demand whatsoever, as well in law as in equity, and whether specifically enumerated herein or not, of the Power Company, in and to all property whatsoever, real, personal and mixed, of every kind and description, and wheresoever situate, which the Power Company may have at any time or from any source acquired.

Second.

That the lien of said Deed of Trust and Indenture

of Mortgage and of the supplemental mortgages securing the said bonds, is subject and subordinate to the claims of the defendants Guy I. Towle and Carl J. Hahn as administrator of the estate of Harry M. King, deceased, and the claims of the said interveners L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, as to all such articles of personalty as do not form a constituent part of and are not presently necessary for the maintenance, repair and operation of the hydro-electric, generating, transmitting and distributing systems of the Power Company or reasonably necessary in conducting its business as a public service corporation, such personalty consisting of construction supplies and materials in excess of the present needs of the Power Company in conducting its business, and of bills and accounts receivable, stocks of merchandise which are intended for sale to the public in the ordinary course of retail business, the public ferry at Shoshone Falls, and stock owned by the Power Company in other corporations, which said claims have been approved and allowed in the respective amounts following, to-wit:

Guy I. Towle	\$13,963.01
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Carl J. Hahn, as administrator of the estate of Harry M. King, deceased.....	6,225.15
L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased	15,625.00
Jake M. Shank	4,390.00

and there is due the said claimants respectively the sums aforesaid, with interest thereon at the rate of 7 per cent per annum from the date hereof.

Third.

That the Trust Company of America, one of the Trustees named in the Deed of Trust or Indenture of Mortgage dated May 1st, 1910, and in the said Supplemental Mortgage or Indenture dated June 21, 1911, and hereinbefore referred to, was duly merged into and became The Equitable Trust Company of New York, the complainant herein; and the said James D. O'Neil was thereafter removed as Trustee under said Indentures of Trust and under the Supplemental Mortgage dated April 7, 1913, and the complainant, The Equitable Trust Company of New York, thereupon became, and at the time of the commencement of this suit was, and now is, the sole Trustee under the said Deed of Trust or Indenture of Mortgage dated May 1st, 1910, and the Supplemental Mortgage or Indenture dated June 21st, 1911, and the Supplemental Mortgage dated April 7th, 1913, sought to be foreclosed in this suit, and is entitled to a decree of foreclosure in its name as sole Trustee under said mortgages and indentures of trust.

Fourth.

That the Power Company has duly issued and delivered, under said Deeds of Trust and Indentures of Mortgage forty-eight (48) registered bonds, numbered from 1 to 48, inclusive, each of the denomination of \$25,000.00, and each certified by the Trustee as provided in said bonds and the Deed of Trust or Indenture of Mortgage dated May 1st, 1910, securing the same, and one thousand thirty (1,030) coupon bonds, numbered from 1 to 1,030, inclusive, each

of the denomination of \$1,000.00, and each certified by the Trustee as provided in said bonds and the Deed of Trust securing the same, and has thereby promised to pay the principal thereof, to-wit: Two Million Two Hundred Thirty Thousand Dollars (\$2,230,000.00), with interest thereon at the rate of five per cent (5%) per annum, payable semi-annually; and said bonds are in all respects valid and binding obligations of the Power Company and are now outstanding in the hands of holders thereof, for value, who are entitled to the benefit and security of said Deeds of Trust and Indentures of Mortgage, without preference or priority of one over the other; and that no part of the principal sum of said outstanding bonds of the defendant Power Company has been paid and no interest has been paid thereon, subsequent to the first day of May, 1914.

Fifth.

That default has been made by said Power Company in the performance of the covenants and conditions of said Mortgage or Deed of Trust, and particularly in this, that said Power Company has wholly failed to pay the interest maturing November 2nd (November 1st being a legal holiday), 1914, and May 1st, 1915, on said \$2,230,000.00, par value, of bonds issued as aforesaid, or any part thereof. And the said William T. Wallace, one of the defendants herein, was on the 2nd day of November, 1914, appointed Receiver of said Power Company and immediately thereupon qualified as such Receiver, and ever since has been and now is in the possession and

control of the property of said Power Company, as the Receiver thereof; and said Receiver has not paid said interest, or any part thereof, and is without the necessary funds to pay the same.

Sixth.

That prior to the commencement of this suit by complainant for the foreclosure of said mortgages and deeds of trust, the holders of more than fifty per cent. (50%) of the bonds issued and outstanding thereunder, as aforesaid, requested complainant in writing, to commence and prosecute all such proceedings at law or in equity, in addition to those specifically mentioned in said deeds of trust and indentures of mortgage, as complainant might be advised is necessary or proper to protect the mortgage security and the rights of the holders of the bonds issued thereunder. And complainant, by notice or notices in writing delivered to the Power Company and the defendant, William T. Wallace, as Receiver of said Company, after default in the payment of the interest maturing on November 2nd, 1914, had continued for six months, has declared the principal sum of all bonds secured by said deeds of trust and indentures of mortgage and then outstanding to be forthwith due and payable.

Seventh.

That no other proceedings at law or suits in equity are now pending under the said deeds of trust or indentures of mortgage, or any of them, by the said complainant as Trustee or by any holders of bonds secured thereby, or by the holders of any coupons

attached to said bonds, to enforce the payment of said sums so covenanted to be paid by said Power Company.

Eighth.

That the premises and property hereinbefore described and subject to this decree, excepting the personalty described in paragraph second, constitute a single, indivisible, hydro-electric, generating, transmitting and distributing system and property appurtenant thereto and connected therewith, engaged in and charged with a public service; and such premises and property cannot be sold to advantage except in block as a single parcel, and it is agreed by all the parties hereto that all the property of said Power Company be sold as a single parcel. And to the end that the same may be sold to the best advantage, it is accordingly ORDERED that the property hereinbefore described, and all other property of the defendant Power Company of whatsoever nature or description and wheresoever situated, be sold as an entirety and as a single parcel, without redemption, by the Special Master Commissioner hereinafter named, unless the amount due complainant be paid prior to the date hereinafter fixed for making such payment.

Ninth.

That unless the defendant Power Company or some one of the other defendants, or some one for it or them, shall on or before the twentieth day of December, 1915, pay to the Clerk of this Court for the complainant, as Trustee for the holders of said outstanding bonds, the sum hereinbefore in paragraph

Fourth hereof, adjudged to be due as principal and interest, with interest thereon at the rate of seven per cent. (7%) per annum from the date of this decree until the date of such payment, then the said mortgaged premises, and every part and parcel thereof, shall be sold as hereinafter described; and all the right, title and equity of the defendants, except as herein otherwise expressly provided, and of each and all of them, and of all persons claiming any right, title, or interest subsequent to the date of the filing of this suit in and to the said mortgaged premises, property, rights, assets, and franchises, and every part and parcel thereof, shall be forever barred and foreclosed. But if said sum shall be paid, as herein decreed, on or before said date, then any party hereto may apply to this Court for such further relief and such further directions as shall be just and equitable. Any such payment may be made, in whole or in part, by the delivering to the Clerk for cancellation all outstanding bonds and coupons, matured and unpaid, secured by the mortgage to the complainant, which said bonds and coupons shall be accepted towards such payment at their par value.

Tenth.

That for the purpose of making said sale Van W. Hasbrouck, Esq., of Boise, Idaho, is hereby appointed a Special Master Commissioner of this Court to make the sale hereby ordered and decreed, and to execute and deliver a deed of conveyance of the property so to be sold to the purchaser or purchasers thereof, on the order of the Court, or of the Judge thereof, con-

firming such sale; the Court, however, reserving the right to appoint, in term time or at Chambers, another person as such Special Master, with like powers, in case of the death or disability to act of the Special Master hereby designated, or in case of his resignation or failure to act, or removal by the Court. The said Master is hereby authorized and directed to sell at public sale to the highest bidder, in conformity with the directions in this behalf hereinafter set forth and the rules and practice of this Court sitting in equity and the laws of the United States in such cases made and provided, all and singular the property, assets, rights, license, franchises, contracts, tolls, rents, profits, privileges and choses in action of the defendant Power Company, including all the property in this decree described, free from all rights, titles, interests, liens, and claims and equity of redemption of all and every of the parties to this cause, except as herein otherwise expressly provided.

IT IS FURTHER ORDERED that such sale be made by said Special Master on a day to be named by him in his notice of sale, in accordance with the request of the solicitors for complainant or by order of this Court or a Judge thereof at Chambers, at the front door of the Court House in the City of Twin Falls, Twin Falls County, Idaho, which said County is the County in which the greater part of the property of the Power Company subject to this decree is located, with power to adjourn said sale from time to time by oral announcement made at the time there-

tofore fixed for such sale, without further advertisement, but only on the request of the complainant or its solicitors or by order of the Court or a Judge thereof, without prejudice to the notice or notices of sale and without necessity of publishing any further notice. But the Special Master may nevertheless give such notice of his action by publication or otherwise as he may deem fit.

That before making said sale the Special Master shall publish a notice thereof once a week for at least four (4) weeks prior to such sale in one newspaper printed, regularly issued, and having a general circulation in Twin Falls County, State of Idaho, and also in a newspaper printed, regularly issued, and having a general circulation in Gooding County, State of Idaho, in each of which counties property of said Power Company to be sold under this decree is situated. And said notices, and each thereof, shall among other things briefly describe in general terms the real estate and other property to be sold, making reference to this decree for a more particular description thereof.

Any party to this cause and any holder or holders of any of the bonds described in complainant's bill, and any committee or agent representing any holder or holders of said bonds, as well as any other person, may bid or purchase at such sale; and the property hereby directed to be sold may be inspected by intending bidders, subject to such reasonable regulations as the Receiver of said property now in possession thereof may prescribe.

The Special Master shall receive no bid from any one offering to bid who shall not have deposited with the Special Master at or before the time of making his bid, as a pledge that he will make good his bid in case of its acceptance, the sum of Twenty-five Thousand Dollars (\$25,000.00) in money or a certified check or checks for said amount payable to the order of the Special Master, certified by a bank or trust company in the City of New York or State of Idaho. All deposits received by the Special Master, except that deposited by the bidder whose bid is provisionally accepted by said Master, shall be returned by him at the conclusion of the sale to the bidder or bidders from whom they were received.

In case any bidder shall fail to make good his bid, or shall fail to comply with any order of the Court relating to the terms of sale or the payment of the balance of the purchase price, the money, checks, or bonds deposited by said bidder or purchaser shall be forfeited, and such forfeited money, checks, or bonds shall be applied toward the payment of the expenses of such sale and any re-sale which may be ordered and to such other purposes as the Court may direct. If any sale for which a deposit shall have been made and a bid shall have been provisionally accepted by the Special Master shall not be confirmed by the Court, such deposit shall be returned to the bidder.

The Court reserves jurisdiction and power to fix, by directions to the Special Master, a minimum or up-set price for said property.

Eleventh.

The said Special Master is hereby ordered and directed to make full report of his proceedings hereunder, and upon the making of the Master's report of sale the purchaser, or any party to this suit, may move for confirmation thereof, and a time shall be set for the hearing of said motion and such objections as may be made at such confirmation. If the sale be not confirmed, a resale shall be ordered as authorized by law; and upon such resale the same proceedings shall be had as upon the original sale, save and except that no further notice thereof need be given than a brief notice of the time and place of resale, referring to the notices first published for the terms and conditions thereof and for the description of the property, which notice shall be published in such paper and for such duration as the Court in its order for resale may direct. If the sale be confirmed, the Court shall in such order of confirmation fix the time and terms of payment of the balance of the purchase price over and above the cash or proceeds of any certified check, deposited upon any bid at the time of sale, as hereinbefore provided, which said cash or proceeds shall be received as part of such purchase price. And in such order the Court shall likewise prescribe any further amount of the purchase price which shall be paid in cash, which amount shall be sufficient to discharge all claims against the proceeds of sale. And all undetermined preferences, claims, interests, rights, or title in or to the property to be sold, as herein provided, or the proceeds thereof,

shall be and the same are hereby transferred to the proceeds of such sale, to the end that said property may be sold absolutely free and clear of all liens, claims and encumbrances whatsoever.

The remainder of the purchase price not required to be paid in cash may be paid in cash, or the purchaser of said property may satisfy and make good the remainder of his bid, in whole or in part, by delivering to said Special Master bonds secured by the Deed of Trust or Mortgage to complainant, and matured and unpaid coupons for interest on the same, so far as they will go towards paying such remainder, which bonds and coupons, unless in negotiable form and payable to bearer, shall be duly endorsed and assigned in blank all of which bonds and coupons shall be received at such price or value as shall be equivalent to the sum which would be payable on such bonds and coupons out of the said proceeds of the sale, if such sale were made for money and the whole amount of the purchase price were paid in cash.

If there shall be realized on the sale and applied on the purchase price the full amount due on said bonds and coupons, then and in that case the said bonds and coupons, or such of them as are so paid in full, shall be cancelled and filed with the Court for such disposition as the Court may order. But if there shall not be realized on the sale and applied on the purchase price the full amount due on said bonds and coupons, the Special Master shall stamp or write on each bond or coupon the amount which is so applied thereon, and also the amount of the deficiency

remaining after such application, and shall return such bonds and coupons after they are so stamped or written upon to the owners thereof, unless the Court shall otherwise direct.

Twelfth.

The Court reserves jurisdiction, authority, and discretion to reject any bid which, in the judgment of the Court, is inadequate or subject to just objection; and the Court reserves the right and jurisdiction to retain and resell the property in case the purchaser, his successors or assigns, shall fail to comply with any of the provisions of this decree, or with any order or direction respecting the payment of the purchase price, or if any sale fails of confirmation.

Thirteenth.

Upon the confirmation of said sale and upon compliance by the purchaser with any directions which the Court may make in its order of confirmation as condition precedent to the delivery of deed, the Special Master shall execute and deliver a deed of all the properties herein described and sold by said Master, and complainant and the Power Company shall, also, execute and deliver to the purchaser confirmatory deeds and assurances of title in form approved by the Court. The purchaser, his successors or assigns, shall upon delivery of such instrument or instruments of conveyance be vested with the title to and shall hold possession and enjoy the said property sold, free and clear from all rights, title, claims, benefits and equities of redemption of all parties to this cause; and said parties and all persons claiming

from, under or through them, or either of them, their heirs, personal representatives, successors and assigns, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of the Bill in this cause shall be forever barred and foreclosed of and from all equity and claim of, in and to the mortgaged premises and every part and parcel thereof, from and after delivery of the said Master's deed.

Fourteenth.

That the proceeds of sale of said premises and property so sold by said Special Master, shall be apportioned and divided into two funds, hereinafter sometimes called, respectively, the "Bond Fund" and the "Unsecured Creditors' Fund," and such apportionment or division of the proceeds of said sale shall be made according to the relative value of the premises, property and assets upon which complainant has herein been decreed a first, paramount and superior lien, and the personal property described generally in paragraph Second hereof and upon which certain creditors of the defendant Power Company have been decreed a lien prior and superior to the lien of complainant, all as set forth in said paragraph Second. And the "Bond Fund" shall be that part of the proceeds of sale produced by or derived from a sale of the premises and property upon which complainant has herein been decreed a first, paramount and superior lien as aforesaid, the same being all the premises, property and assets of the defendant Power Company except that certain personal property of

said defendant expressly made subject to the claims of certain creditors of said defendant Power Company, as set forth in paragraph Second of this decree. And the "Unsecured Creditors' Fund" shall be that part of the proceeds of sale produced by or derived from a sale of that certain personal property described generally in paragraph Second hereof and upon which the lien of complainant has been decreed subject and subordinate to the claims of certain creditors of the Power Company, as set forth in said paragraph Second. And the Court reserves jurisdiction, power and authority to apportion or divide the proceeds of sale as aforesaid, and any party to this suit may upon notice to all parties bring on for hearing the matter of apportioning or dividing such proceeds of sale into the funds and upon the basis aforesaid.

Fifteenth.

That the "Unsecured Creditors' Fund," being the proceeds of said sale produced by or derived from a sale of that certain personal property described generally in paragraph Second of this decree and upon which the lien of complainant is subject and subordinate to the claims of certain creditors of the Power Company, shall be applied as follows:

(a) To the payment, pro rata with the Bond Fund, according to the ratio that it bears to the gross proceeds of sale, of all proper expenses attendant upon said sale, including the expense, outlays and compensation of the Special Master in making such

sale, as such expense, outlays and compensation may be hereafter fixed and allowed;

(b) To the payment, pro rata with the Bond Fund, according to the ration that it bears to the gross proceeds of sale, of the cost and expenses of the cause now pending in this Court wherein the said Guy I. Towle is plaintiff and the said Power Company is defendant, being Equity Cause No. 509, in which the said William T. Wallace was on the 2nd day of November, 1914, appointed Receiver of said Power Company, including the Receiver's expenses and charges allowed in said cause and the expenses of administering the estate by said Receiver; but only after exhausting the income and other funds, if any, in the hands of said Receiver especially applicable to such purpose;

(c) To the payment of the claims of the said Guy I. Towle, Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, L. M. Plumer and E. B. Scull, as executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, as the same have been determined and allowed in paragraph Second of this decree, and if the amount available for such payment shall be insufficient to pay all of said claims in full, then to the payment thereof pro rata according to the amount due said claimants respectively.

(d) Should there be any surplus after payment in full of the foregoing amounts, the same shall be converted into the Bond Fund to be paid out and distributed as hereinafter provided for the payment of claims out of said fund.

Sixteenth.

That the Bond Fund, being the proceeds of said sale produced by or derived from the sale of the premises and property upon which complainant has herein been decreed a first, paramount and superior lien, shall be applied as follows:

(a) To the payment, pro rata with the Unsecured Creditors' Fund, according to the ratio that it bears to the gross proceeds of sale, of all proper expenses attendant upon said sale, including the expenses, outlays and compensation of the Special Master in making such sale, as such expenses, outlays and compensation may be hereafter fixed and allowed;

(b) To the payment, pro rata with the Unsecured Creditors' Fund, according to the ratio that it bears to the gross proceeds of sale, of the costs and expenses of the cause now pending in this Court wherein the said Guy I. Towle is plaintiff and the said Power Company is defendant, being Equity Cause No. 509, in which the said William T. Wallace was on the 2nd day of November, 1914, appointed Receiver of said Power Company, including the Receiver's expenses and charges allowed in said cause and the expenses of administering the estate by said Receiver; but only after exhausting the income and other funds, if any, in the hands of said Receiver especially applicable to such purpose;

(c) To the payment of the costs of this suit and the compensation of the complainant herein for its services, charges, and expenses in the execution of its

trust under said Deeds of Trust or Indentures of Mortgage, so made to it as aforesaid, including its own compensation and commissions and its disbursements for solicitors and counsel fees in the execution of said trust and the foreclosure of said mortgages, as such charges, expenses, and compensation may be hereafter fixed and allowed by this court.

(d) To the payment of claims and demands, if any there be, which may be awarded priority over said bonds and preference over the same in the distribution of the assets of the estate of the Power Company, and which, because of insufficient funds, cannot be paid out of the funds in the hands of the Receiver or out of the Unsecured Creditors' Fund.

(e) To the payment of principal and interest on the bonds and coupons herein found to be due and payable; but in the event the said proceeds of sale are insufficient to pay all of said bonds and coupons and interest thereon in full, the said proceeds shall be ratably distributed among the holders thereof, without preference of one over another; provided, however, that the Court reserves jurisdiction and power to hereafter determine the amount due from the Power Company to the several holders of said bonds and coupons, and if any of said bonds or coupons be held as security for obligations of the Power Company, the holder thereof shall in no event be paid more than the amount due from the Power Company under the obligation or obligations for the payment of which said bonds or coupons may be held as collateral.

(f) If, after making all the above payments, there shall be any surplus, the same shall be paid according to the further order of the Court in that regard.

Seventeenth.

That in case there shall be any deficiency in the amount required to be paid in full of the several amounts directed and allowed to be paid, then the said Special Master shall report to the Court the amount of the deficiency; and the complainant, as Trustee, shall have judgment against the said defendant Power Company for the amount due, and shall have execution therefor, pursuant to the rules and practice of this Court.

Eighteenth.

The Court retains and preserves power and jurisdiction to make such further orders as are or may be necessary to carry out this decree and to vest title in the properties subject hereto in the purchaser or purchasers thereof, and to adjudicate claims against and distribute any surplus proceeds arising from the sale, after the satisfaction of complainant's said claim, and to restore to the Receiver in Cause No. 509 out of the proceeds of said sale, such part, if any, of the income or earnings in such cause, as may have been expended or paid out in discharge of the interest upon underlying bonds, indebtedness incurred for construction work, sinking fund and other non-operating purposes, and to make any further order in the premises that may be meet and just. The cash in the hands of said Receiver or in bank

shall be subject to such order as may be made relative thereto in said Cause No. 509, and all such cash and funds in banks shall be unaffected by this decree, but no right or claim thereto is waived by any party to this cause or affected by anything contained in this decree.

Nineteenth.

The provisions of this decree shall not be construed as establishing a lien in favor of the Trustee or bondholders upon the income or earnings during the receivership, including earnings uncollected, or as foreclosing the claims of general creditors to have such earnings and income distributed to them; but all such claims may be adjudicated, determined and established in Equity Cause No. 509 pending in this Court, wherein Guy I. Towle is plaintiff and the said Great Shoshone and Twin Falls Water Power Company is defendant.

Any party may apply to the Court for further orders and directions at the foot of this decree.

Done this 6th day of December, 1915.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed Dec. 6th, 1915.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective solicitors, that the personal property refer-

red to in paragraph Second and other paragraphs of the Decree entered in this cause on December 6th, 1915, consisting of construction supplies and materials in excess of the present needs of the Power Company in conducting its business, and of bills and accounts receivable, stocks of merchandise which are intended for sale to the public in the ordinary course of retail business, the public ferry at Shoshone Falls, and stock owned by the Power Company in other corporations, being the property upon which the interveners and certain of the defendants were adjudged to have claims prior and superior to the lien of complainant, is of the reasonable value of Forty-five Thousand Dollars (\$45,000.00); it is further stipulated and agreed that in apportioning the proceeds derived from the sale of the property of the defendant Power Company under said decree, said sum of \$45,000.00 shall be placed into what is in said decree sometimes called the "Unsecured Creditors' Fund," to be apportioned and distributed as in said decree provided, relative to the payment and distribution of such Unsecured Creditors' Fund.

This stipulation is made to avoid the necessity of a hearing for the purpose of apportioning the proceeds of sale, as provided in paragraph Fourteen of said Decree, and nothing herein contained shall be construed as a waiver of any right by any of the parties hereto except or object to or appeal from any of the provisions of said Decree, or any order hereafter made based on said decree.

Dated this 24th day of December, 1915.

RICHARDS & HAGA,

Solicitors for Complainant.

KARL PAINE,

Solicitor for Defendant Guy I. Towle.

JAMES H. WISE,

Solicitor for Defendant Carl J. Hahn.

MARTIN & CAMERON,

Solicitors for L. M. Plumer and E. B. Scull.

ALFRED A. FRASER,

Solicitor for Jake M. Shank.

P. B. CARTER,

Solicitor for Defendant Great Shoshone and Twin
Falls Water Power Company.

Endorsed: Filed Dec. 29, 1915.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity—No. 526.

ORDER.

It appearing that all parties to the cause have stipulated in writing that the personal property referred to in paragraph Second of the decree entered in this cause on December 6th, 1915, consisting of construction supplies and materials in excess of the present needs of the Power Company in conducting its business, and of bills and accounts receivable, stocks of merchandise which are intended for sale to the public in the ordinary course of retail business, the public ferry at Shoshone Falls, and stock owned by the Power Company in other corporations, being the property upon which the interveners and certain of

the defendants were adjudged to have claims prior and superior to the lien of complainant, is of the reasonable value of Forty-five Thousand Dollars (\$45,000.00).

IT IS THEREFORE ORDERED that the proceeds from the sale of the property of the defendant Great Shoshone and Twin Falls Water Power Company shall be apportioned as follows: Forty-five Thousand Dollars (\$45,000.00) of the proceeds of said sale shall be placed to the credit of the Unsecured Creditors' Fund referred to in said decree, and the balance of said proceeds shall be placed to the credit of what is referred to in said decree as the "Bond Fund."

Done in open Court this 27th day of December, 1915.

FRANK S. DIETRICH,
District Judge.

Endorsed. Filed Dec. 29th, 1915.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity—No. 526.

NOTICE OF MOTION FOR CONFIRMATION OF
SALE.

To the above-named defendants and to their solicitors of record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that on Monday, the 14th day of February, 1916, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the undersigned, solicitor of record for plaintiff,

Equitable Trust Company of New York, will on behalf of said plaintiff move said Court at the Court Room thereof in the Federal Building at Boise, Idaho, for an order confirming the Master's sale of the properties of the defendant, Great Shoshone and Twin Falls Water Power Company, held on January 8, 1916, and directing the execution and delivery of a deed to the purchaser at said sale, Electric Investment Company, in accordance with written motion, copy of which is herewith served upon you. Said motion will be based upon the decree in said cause and upon the Master's report of said sale filed with the Clerk of this Court on January 14, 1916.

Dated this 25th day of January, 1916.

RICHARDS & HAGA,
Solicitors for Plaintiff.

Endorsed: Filed Feb'y 1, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity—No. 526.

MOTION FOR CONFIRMATION OF SALE.

Comes now the plaintiff, Equitable Trust Company of New York, and moves the Court for an order confirming the sale of all the property rights and assets of the defendant Great Shoshone and Twin Falls Water Power Company to Electric Investment Company, made on the 8th day of January, 1916, by the Special Master appointed in said cause, and directing the Master to execute and deliver a deed to the purchaser of all such property, rights, and as-

sets. This motion will be based upon the Special Master's report of said sale and the records and files in the cause.

Dated this 25th day of January, 1916.

RICHARDS & HAGA,
Solicitors for Plaintiff.

Endorsed: Filed Feb'y 3, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity—No. 526.

ORDER CONFIRMING SALE.

Now, on the 14th day of February, 1916, come again the parties by their respective solicitors, and the purchaser, the Electric Investment Company, by its counsel, and the motion of the complainant, Equitable Trust Company of New York, Trustee, that the report of Van W. Hasbrouck, the Special Master, filed herein on the 14th day of January, 1916, should be approved and confirmed, and that the sale of the mortgaged property, power plants, transmission lines, equipment, machinery, lands, water rights, franchises and property of the defendant, Great Shoshone and Twin Falls Water Power Company, should be confirmed and made absolute, came regularly on to be heard, pursuant to notice served upon all the parties to this cause, as evidenced by written acceptance of service by the respective solicitors of the said parties.

The Court having examined the report of the Special Master and the exhibits attached thereto, and it

principal amount of \$1,000, numbered from 1 to 1030, consecutively, both inclusive, payable to bearer, with November 1, 1913, and all subsequent coupons attached, aggregating in principal amount \$1,030,000; and will produce the certificate of said Trust Company that it holds the said bonds, and each and all of them, and the coupons thereto attached, subject to the order of said Special Master and the Judge of this Court on account of the purchase price of said property;

And it further appearing that said bonds are all the outstanding bonds of said Great Shoshone and Twin Falls Water Power Company, secured by said deeds of trust and indentures of mortgage, and that said purchaser is ready, able and willing to pay forthwith, in cash, such amount as shall be sufficient to discharge all claims against the proceeds of sale required to be paid in cash under the terms of said decree, upon being advised of the amount required for such purpose.

It is, therefore, futher ordered, adjudged and decreed that such provision for the payment of the residue of said bid of said purchaser is satisfactory to this Court, and is hereby approved by this Court.

It is further ordered, adjudged and decreed that upon delivery by said purchaser to said Special Master of said certificate, or certificates, of said Trust Company, showing the deposit of said bonds, as aforesaid, the Special Master shall sign, seal, execute, acknowledge and deliver a deed, or deeds, of conveyance to said purchaser of all and singular the prop-

erty, power plants, transmission lines, equipment, machinery, lands, water rights and franchises, so sold, as aforesaid; that the defendant, Great Shoshone and Twin Falls Water Power Company, and the complainant, Equitable Trust Company of New York, as sole trustee, under the deed of trust, made by said Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and the supplementary mortgages, dated June 21, 1911, and April 7, 1913, and the Receiver in this cause, respectively, join in said deed, or deeds, of said Special Master, or execute and deliver separate confirmatory conveyances or deeds of the property embraced therein on demand of the purchaser, its successors or assigns, and that in default, or upon failure or refusal of any or either of said parties, to execute such confirmatory deeds or join in such Special Master's deed, the Clerk of this Court is hereby appointed Commissioner of this Court for the purpose of making, executing, acknowledging and delivering such deed, or deeds, conveying all its, their, or his, interest in the property, rights and franchises so sold, as aforesaid. The parties having filed a stipulation with the Clerk of the Court and the Court having ordered that what is known as the "water works system" in the Village of Shoshone, shall be conveyed direct to said Village by the Receiver, this order of confirmation shall not be construed as embracing such property, but the same shall be unaffected by anything herein contained and by anything that may be contained in such Master's deed, and such property shall be con-

veyed in accordance with the order entered herein on the 14th day of February, 1916, relative to the conveyance thereof.

It is further ordered and decreed that upon the delivery to said purchaser of said deed, or deeds, of conveyance, to be made by said Special Master, the said purchaser, the Electric Investment Company, shall fully possess and be invested with said property, power plants, transmission lines, equipment, machinery, lands, water rights and franchises, so sold and so conveyed, as the absolute owner thereof; that on the exhibition to him of said deed, or deeds, the Receiver of this Court who until such exhibition thereof to him shall continue as heretofore the operation of the mortgaged premises, is authorized and directed, and is required, to let said grantee into possession of the premises and property conveyed; that the Receiver, or any party to this cause having possession of the same, deliver to said grantee all property embraced in said Special Master's deed, or deeds, together with and including all earnings and income thereof not embraced in the earnings and income of the receivership, as shown by the books of the Receiver at the close of business on the 31st day of January, 1916, to the end that the purchaser may receive such property with all earnings and income thereof subsequent to the 31st day of January, 1916, and since the reading of the meters for the month of January; that the Receiver shall pay all expenses of operation and other expenses, obligations and accounts incurred by him up to the 1st day of Febru-

ary, 1916, and the purchaser shall pay all expenses of operation, obligations and accounts incurred by the Receiver in the regular course of business subsequent to the 31st day of January, 1916, to the end that the books of the Receiver may be closed as of said date; that the right of the purchaser in and to the cash on hand at the close of business on the 31st day of January, 1916, or any part thereof, shall be reserved for future determination and order in Equity Cause No. 509.

That the purchaser, Electric Investment Company, shall be, and is hereby subrogated, upon receiving said conveyance, or conveyances, to all and singular the rights of all parties to this action with respect to said property, power plants, transmission lines, equipment, machinery, lands, water rights and franchises, sold, as aforesaid, with the right to prosecute and defend all issues relative to its title to or interest in the moneys, bills and accounts receivable, and other property in the possession of the Receiver in Equity Cause No. 509, and all other actions and proceedings involving or relating to the said property, rights and franchises, or any part thereof, whether in the name of any of the parties hereto, or of said Receiver, or otherwise, as may be proper under the circumstances of the case, including the right to prosecute proceedings in error or on appeal.

It is further ordered and decreed that said first mortgage bonds and coupons deposited with the complainant, Equitable Trust Company of New York, and forming the subject of its certificate or certifi-

cates of deposit, which may be delivered to such Special Master, remain on deposit with said complainant, Trust Company, to abide the further order of the Court herein.

It is further ordered and decreed that after payment of the amounts by said decree directed to be paid in priority to the said bonds, any residue of the fund realized from said sale shall be applied in accordance with said decree, and as therein directed, toward the payment of the amount by said decree adjudged to be due at the date thereof; that all allowances and compensation for complainant and its counsel and for costs and disbursements properly taxable in this cause are reserved for future order, and pending such determination and other matters herein reserved, the distribution of the proceeds of sale shall abide the further order of the Court herein.

That the delivery of said deed, or deeds, of conveyance, and of the possession of said property, rights and franchises, sold, as aforesaid, shall be subject to the right of the Court to require such further payment or payments to be made in cash on account of such purchase price bid in order to meet the claims which, under said decree, are or may become payable out of the proceeds of sale in priority to the said amount due on said first mortgage bonds as the Court may, from time to time, direct, and the Court reserves the right, in case such purchaser, its successors or assigns, shall fail or neglect to make any payment in cash on account of any unpaid balance of the purchase price bid within fifteen days after the

entry of an order requiring such payment, and service of a copy of said order upon said purchaser, its successors or assigns, to retake and resell such mortgaged property, power plants, transmission lines, equipment, machinery, lands, water rights and franchises, and jurisdiction of this cause is retained for that purpose, and to the end that the jurisdiction of the Court over the purchaser shall be complete in the premises, it is ordered that the purchaser, the Electric Investment Company, enter its appearance in this cause and in Cause No. 509 by a member of the bar of this Court before the delivery of such Master's deed, and said Electric Investment Company shall thereupon be and become a party therein and thereto for all purposes affecting its interest in the property and moneys herein referred to.

The Court further retains jurisdiction of the cause for the purpose of determining the amount of the deficiency judgment, if any, to which complainant may be entitled.

The Special Master shall deposit in a national bank in Boise, Idaho, the cash received by him from said Electric Investment Company, its successors or assigns, subject to such disposition as the Court may make, the same to be disbursed and paid out upon checks signed by the Special Master and counter-signed by the Judge of this Court.

Dated February 16th, 1916.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed Feby. 16, 1916. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity—No. 526.

NOTICE OF APPEARANCE OF ELECTRIC INVESTMENT COMPANY.

To the Clerk of said Court and to the Solicitors of Record for the parties above named:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, That the Electric Investment Company, the purchaser of the properties of the Great Shoshone and Twin Falls Water Power Company sold under the decree of foreclosure entered in the above entitled cause on December 6, 1915, hereby enters its appearance in said cause in accordance with and for all purposes contemplated by the order of confirmation of sale made herein on the 16th day of February, 1916.

Dated this 21st day of February, 1916.

ELECTRIC INVESTMENT COMPANY,

By F. F. Johnson, President.

RICHARDS & HAGA,

Solicitors for Electric Investment Company.

Residence: Boise, Idaho.

Endorsed: Filed Feby. 22, 1916. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

In Equity—No. 526.

PETITION FOR ORDER TO SPECIAL MASTER TO PAY PRIOR LIEN CLAIMS OF GUY I. TOWLE; CARL J. HAHN AS ADMINISTRATOR OF THE ESTATE OF HARRY M. KING;

AND L. M. PLUMER AND E. B. SCULL AS EXECUTORS OF THE ESTATE OF L. L. M'CLELLAND, DECEASED, AND JAKE M. SHANK.

The petition of Guy I. Towle; Carl J. Hahn, as administrator of the estate of Harry M. King, deceased; L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, respectfully shows:

1. That on the 2nd day of November, 1914, William T. Wallace was duly and regularly appointed the receiver of the property of the insolvent defendant Great Shoshone and Twin Falls Water Power Company, and after becoming duly qualified as such, by giving and filing the due, regular and proper bond as required, the said receiver took possession, on or about the above said date, of all of the property of said insolvent corporation, defendant herein.

2. That at the time said receiver took possession of said property, all of said property of said Great Shoshone and Twin Falls Water Power Company, including all real, personal and mixed property, was covered by the lien of a deed of trust or mortgage given to secure a series of bonds, the form and tenor of which said bonds are set out at length in the deed of trust, dated May 1, 1910, which said deed of trust was duly made and executed by said Great Shoshone and Twin Falls Water Power Company, on the 21st day of July, 1910, in order to secure the due and punctual payment of the principal and interest of all of said bonds at any time issued and outstanding, to the Trust Company of America and James D.

O'Neil, as trustees and their successors in the trusts therein created, as shown by the said deed of trust, a copy of which is annexed to the bill of complaint herein, marked Exhibit "A", and the supplemental mortgage bearing date June 21, 1911, between the same parties, annexed to said bill of complaint and marked Exhibit "B", and the supplemental mortgage bearing date the 7th day of April, 1913, between the Great Shoshone and Twin Falls Water Power Company and the Equitable Trust Company of New York, successor by merger to the Trust Company of America, and James D. O'Neil, annexed to said bill of complaint, marked Exhibit "C".

3. That thereafter on the 14th day of April, 1915, the complainant, The Equitable Trust Company of New York, filed its bill of complaint in this action to foreclose the said deed of trust and supplemental mortgages, and made the above named defendants, defendants in said foreclosure action, including in the said defendants the said William T. Wallace, receiver.

4. That on the 16th day of October, 1916, (?) L. M. Plumer and E. B. Scull, as executors of the estate of L. L. McClelland, deceased, and within the next few days thereafter, Jake M. Shank, Carl J. Hahn as administrator of the estate of Harry M. King, deceased, and Guy I. Towle, proved their claims in the suit, in this Court, entitled Guy I. Towle, Plaintiff, vs. Great Shoshone and Twin Falls Water Power Company, Defendant, the same being Cause No. 509 in which the said Wm. T. Wallace was on Nov. 2,

1914, appointed receiver and received an order of this Court setting forth that upon the hearing of these respective claims, it was admitted by the said receiver, appearing in person and by his attorney, S. H. Hays, that the claims set forth by the respective claimants above named, appear upon the books of the said Great Shoshone and Twin Falls Water Power Company as valid and existing claims against the said company, whereupon the said claims were duly and regularly allowed in the sums as set forth hereinafter, to-wit:

Guy I. Towle.....	\$13,963.01
Carl J. Hahn as administrator of the estate of Harry M. King, deceased....	6,225.15
L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, de- ceased	15,625.00
Jake M. Shank.....	4,390.00

5. That thereafter on the 23rd day of October, 1915, your petitioners L. M. Plumer and E. B. Scull, as executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, petitioned to intervene in this action, on behalf of themselves only, and set up certain defenses, which said interveners believed to be valid, and which defenses, the interveners believed would entitle them to prior liens over the lien of the deed of trust and supplemental mortgages, in certain personal property of the Great Shoshone and Twin Falls Water Power Company, and this Court allowed the intervention of these two said claimants. That these two said claimants and the

other two of your petitioners who had been made defendants in the foreclosure suit in the first instance, viz. Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, and Guy I. Towle, then duly and regularly filed their separate answers, answering for themselves, respectively, only and individually, setting up their defenses to the said deed of trust and said supplemental mortgages; that the said receiver, defendant herein, filed his answer in this cause subsequent to the filing of the answers on the part of these four petitioners, and did not see fit to set up the defenses set up by these four claimants in their respective answers, but by the receiver's answer joined no issue on the bill of complaint herein, and did not raise the objections to said deed of trust and supplemental mortgages for the general creditors appearing by and through the said receiver only, which were raised by these four petitioners in their individual answers, filed each for himself herein, and upon the hearing, when the receiver and his attorney were present in open court, the receiver did not ask leave to amend his pleadings so as to set up the objections to the deed of trust and supplemental mortgages, which had been set up by your four petitioners.

6. That thereafter, on the 25th day of October, 1915, this cause came on for hearing in open court, without a jury, the defendant Great Shoshone and Twin Falls Water Power Company, had not filed an answer herein when the hearing commenced, but after the proceedings had been carried on at the

hearing for a few hours, P. B. Carter, Esq., an attorney of this court, appeared in court at the hearing and said to the court that he had just received a telegram from Mr. H. Hobart Porter, who was president of the American Water Works and Electric Company and also the president of the Great Shoshone and Twin Falls Water Power Company, in which H. Hobart Porter had instructed Mr. Carter to file an answer in this cause on behalf of the Great Shoshone and Twin Falls Water Power Company admitting all of the allegations of the bill of complaint herein. Whereupon, the court asked what was his object in filing the answer this late in the proceedings when it tendered no issue, and Mr. Carter answered that he was instructed by Mr. Porter to do so, and the court did not order the filing of the answer. That after the evidence in the cause was submitted and defendants Towle and Carl J. Hahn and the interveners had made their due and regular objections thereto in accordance with the issues tendered by their respective answers, and the argument of counsel for the respective parties, the court then took the cause under advisement.

7. That on the 6th day of December, 1915, this court rendered its decree, wherein it was ordered, adjudged and decreed, among other things, and the said William T. Wallace, as receiver of the Great Shoshone and Twin Falls Water Power Company is made a party to and bound by the terms of the decree, as follows: That the said deed of trust and supplemental mortgages, above described and referred to

“are first and paramount liens, prior and superior to all other liens, incumbrances, right, title, interest, claim or demand of any of the parties defendant herein, and of any other person or persons who may be bound by this decree, except as hereinafter expressly provided and decreed, upon all the property, whether real, personal or mixed, of the said Great Shoshone and Twin Falls Water Power Company, whensoever acquired.”

Second: “That the said lien of said deed of trust and supplemental mortgages securing said bonds, is subject and subordinate to the claims of defendants Guy I. Towle and Carl J. Hahn as administrator of the estate of Harry M. King, deceased, and the claims of the said interveners L. M. Plummer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, as to all such articles of personalty as do not form a constituent part of and are not presently necessary for the maintenance, repair and operation of the hydro-electric, generating, transmitting and distributing system of the Great Shoshone and Twin Falls Water Power Company or reasonably necessary in conducting its business as a public service corporation, such personalty consisting of construction supplies and materials in excess of the present needs of the said power company in conducting its business, and of bills and accounts receivable, stocks of merchandise which are intended for sale to the public in the ordinary course of retail business, the public ferry at Shoshone Falls, and stock owned by the Power Company in other cor-

porations, which said claims have been approved and allowed in the respective amounts following, to-wit:

Guy I. Towle.....\$13,963.01

Carl J. Hahn, as administrator of the es-

tate of Harry M. King, deceased..... 6,225.15

L. M. Plummer and E. B. Scull, as ex-

ecutors of the estate of L. L. McClel-

land, deceased..... 15,625.00

Jake M. Shank..... 4,390.00

and there is due the said claimants respectively the sums aforesaid, with interest thereon at the rate of 7% per annum from the date hereof. (Dec. 6, 1915.)

Third: That the amount of the bonds outstanding and issued by the power company is \$2,230,000.00.

Fourth: That the premises and property of the said Power Company subject to this decree, except the personally described in paragraph second of this decree, constitute a single, indivisible, hydro-electric, generating, transmitting and distributing system and property appurtenant thereto and connected therewith engaged in and charged with a public service; and such premises and property cannot be sold to advantage except in a block as a single parcel, and it is agreed by all of the parties hereto (including interveners) that all the property of said Power Company be sold as a single parcel. And to the end that the same may be sold to the best advantage, it is accordingly ordered that the property hereinbefore described, and all other property of the defendant Power Company of whatsoever nature or description and wheresoever situated, be sold as an entirety and

as a single parcel, without redemption, by the special master commissioner, hereinafter named, unless the amount due complainant be paid prior to the date hereinafter fixed for making such payment."

8. That said decree provided, that if the sale be confirmed, the Court shall in such order of confirmation fix the time and terms of payment of the balance of the purchase price over and above the cash or proceeds of any certified check, deposited upon any bid at the time of the sale, as hereinbefore provided, which said cash or proceeds shall be received as part of such purchase price. And in such order the Court shall likewise prescribe any further amount of the purchase price which shall be paid in cash, which amount shall be sufficient to discharge all claims against the proceeds of sale.

9. That said decree provided that that part of the proceeds of the sale produced by or derived from a sale of that certain personal property described generally in paragraph second of the decree, and upon which the lien of complainant is subject and subordinate to the liens of these petitioners, should be applied as follows:

(a) To the payment of petitioner's proportion of the expenses of the master's sale.

(b) To the payment of the petitioner's proportion of the expenses in the suit of Guy I. Towle, plaintiff, vs. The Great Shoshone and Twin Falls Water Power Company.

(c) To the payment of the liens of these petitioners.

(d) Any surplus should go to the complainant.

10. That on or about the 29th day of December, 1915, your petitioners stipulated in writing with complainant herein that the value of the personal property upon which this Court had decreed that your petitioners had a superior lien to that of the lien of the deed of trust and supplemental mortgages, was \$45,000.00. That said stipulation was entered into by petitioners herein, with the knowledge that all claimants and especially the American Water Works and Electric Company had notice of the foreclosure proceedings herein and had allowed the receiver to represent their claims in this action, and to become bound by the decree, and had not seen fit to set up the objections to the deed of trust and supplemental mortgages which were set up by the petitioners herein, although their time and opportunity to do so were equally as good as that of your petitioners, and your petitioners relied upon the terms of the decree as binding upon the receiver and all other general creditors, including the American Water Works and Electric Company, and on account of said decree binding said general creditors and the receiver, your petitioners felt secure in making a stipulation to the effect that the value of the personal property upon which your petitioners had prior liens was only \$45,000, as that amount was sufficient in the judgment of your petitioners to cover the claims of your petitioners.

11. That thereafter, on or about the 30th day of December, 1915, this Court, after due and regular

hearing, fixed the upset price upon all the property of the Great Shoshone and Twin Falls Water Power Company at \$2,000,000.

12. That thereafter, on the 8th day of January, 1916, the special master commissioner of this Court sold all of the property of said Great Shoshone and Twin Falls Water Power Company to the Electric Investment Company for \$2,000,000, and that on or about the 13th day of January, 1916, the special master filed herein his report of said sale.

13. That on or about the 14th day of February, 1916, the complainant noticed a motion for an order confirming the sale of said property, and on said date the said motion came regularly on for hearing before this Court, and all the parties to this suit were represented by their respective counsel, and upon this day also came Frank T. Wyman, Esq., claiming to represent a general unsecured creditor of the said Great Shoshone and Twin Falls Water Power Company, to-wit, the American Water Works and Electric Company, with a claim purported to amount to over a million dollars, and begged leave to intervene in this action in the following terms, to-wit:

“The petition of the American Water Works and Electric Company, a corporation, respectfully shows:

1.

“That your petitioner now and during all the times hereinafter mentioned was a corporation duly organized under and by virtue of the laws of the State of
.....

2.

“That heretofore Guy I. Towle brought in this Court a suit in the nature of a general creditors’ suit against the Great Shoshone and Twin Falls Water Power Company, which is now pending; that thereupon a receiver was duly appointed therein under the direction of this Court who took and still retains possession of the assets of the Great Shoshone and Twin Falls Water Power Company.

3.

“That thereafter notice was published and given by the said receiver, acting under the direction of the Court, requiring all creditors of the said defendant to file proof of their respective claims within a time fixed in said notice; that pursuant thereto your petitioner and other creditors within such period presented their several claims to the receiver and filed them in the manner and form as required by said notice; that the claim of your petitioner is just and no objection has been filed against the allowance of the same.

4.

“That after the bringing of the said suit hereinbefore referred to and the appointment of the receiver therein, suit was brought for the foreclosure of a mortgage given by the said Great Shoshone and Twin Falls Water Power Company upon all its properties and such proceedings were thereafter had, that the said mortgage was foreclosed and the said property of said defendant was under the order of this Court sold by a master; that notice of motion for the con-

firmation of such sale has been given and hearing thereon is now set for February 14, 1916; that so far as your petitioner knows, there are no objections to such confirmation except such as may be involved in the matters set forth in the petition and the bill of intervention herewith presented.

5.

“That your petitioner is interested in the said property and in the proceeds thereof in common with all other general creditors of the Great Shoshone and Twin Falls Water Power Company; that the said proceeds are about to be paid by the purchaser at such sale to the master appointed by this Court, to conduct the same, and by such master such proceeds are about to be distributed to a small number of said general creditors hereinbefore referred to and to the exclusion of your petitioner and the greater part of such general creditors; that the particular facts with respect to such matters hereinbefore referred to are more fully set forth in the bill of intervention herewith presented.

“Your petitioner therefore prays that it may be permitted to intervene in said action and file its said bill of intervention to the end that its rights and those of all other general creditors of said Great Shoshone and Twin Falls Water Power Company may be protected and preserved and that the said fund hereinbefore referred to be not distributed or otherwise disposed of until after the hearing upon said bill in intervention, and that it then be paid to the receiver hereinbefore mentioned for distribution to the gen-

eral creditors of said Great Shoshone and Twin Falls Water Power Company.

“WYMAN & WYMAN,

“Solicitors for American Water Works and Electric Company.

“FRANK T. WYMAN, of Counsel.”

14. That this Court did not allow the petition to intervene and asked counsel for the petition for leave to intervene if he wanted to make a further showing and counsel for petitioner to intervene said that he thought perhaps he would, and the Court thereupon inquired if counsel for petitioner to intervene could not wire for additional information, and counsel for petitioner to intervene said that he could.

15. That the order for confirmation was then taken up and its terms discussed and the attorneys for complainant were directed by the Court to make certain changes in its terms and the order was then to be submitted to the Court and the same was afterwards submitted and signed and filed.

16. That although counsel for petitioner to intervene has now had over a week to make further showing, if he desired to make further showing for leave to intervene, but the said claimant has not made further showing, nor has he appeared in Court and asked for further time in which to do so; that said petitioner for leave to intervene has had notice that this foreclosure suit was filed since April, 1915, now almost a year; that said complainant has had notice of the claim of your petitioners herein since the ans-

wers of your petitioners were filed in October, 1915, over three months, and the time has been ample for counsel to have obtained information concerning the owners of its claim and other information upon which to petition to intervene; that the petitioner to intervene has as its president, H. Hobart Porter, of New York City, and that H. Hobart Porter is also the president of the Great Shoshone and Twin Falls Water Power Co., that as such the said H. Hobart Porter was aiding the complainant herein in these foreclosure proceedings, so that the foreclosure of the deed of trust and supplemental mortgage would cause a sale of all of the property of the said Great Shoshone and Twin Falls Water Power Company; and that said H. Hobart Porter and complainant were working together to obtain the property free from all claims of general creditors; but that when these creditors established prior liens to \$45,000.00 worth of personal property, then complainants and the petitioner to intervene, seeing that all the creditors had not been wiped out as complainant and petitioner to intervene had planned, became, suddenly, ostensibly opposed to each other, and the American Water Works and Electric Company petitions for leave to intervene, not to set up a claim for a prior lien to the mortgage lien and your petitioner have done, but to try to come into the payment of prior lien claims, while admitting that such claimant is only a general creditor and has never taken any action against the lien of the mortgage to make the claim a lien claim.

17. That the expenses of the sale on foreclosure herein were \$595.20; and the allowance for the services of the master in making such sale was \$250.00; that your petitioners are informed and believe that there are sufficient funds in the receiver's hands in the suit wherein Guy I. Towle is plaintiff and said power company is defendant to pay the expenses of said suit.

18. That the claims of your petitioners amount to the aggregate sum of \$40,203.16, together with the interest thereon at the rate of 7% per annum from the 6th day of December, 1915, and that there is approximately \$24,000 on hand in possession of the special master subject to the order of this Court, for the payment of the claims of your petitioners, and that according to the decree herein and the order of confirmation of the sale herein, the Court should order paid into the hands of the special master the further sum of \$21,000, in order that the prior liens of your petitioners may be satisfied and discharged under the terms of said decree.

Wherefore, your petitioners pray for an order

(a) Directing the purchaser the Electric Investment Company to pay into the hands of the master the sum of \$21,000.00 in cash, within 15 days from the date of the order.

(b) That said order shall direct the special master to apply forthwith the said \$24,000.00 now in the hands of the special master upon the payment of the prior liens of your four petitioners herein pro rata.

(c) That said order shall direct the special master to pay the balance of the prior liens of your petitioners together with all the interest due thereon down to the date of payment, immediately upon the said sum of \$21,000.00 in cash being paid into the hands of the special master as provided in said order.

(d) That if any balance still remains in the hands of the special master, that the same may be held subject to the further order of this Court.

(e) And for general relief.

J. H. WISE,
KARL PAINE,
ALFRED A. FRASER and
MARTIN & CAMERON,
Solicitors for Petitioners.

(Duly verified.)

PARIS MARTIN, of Counsel.

Endorsed: Filed Feb'y 22, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ORDER TO MASTER TO PAY PRIOR LIEN
CLAIMS OF PETITIONERS.

THE APPLICATION of L. M. Plumer and E. B. Scull as executors of the estate of L. L. McClelland, deceased, Guy I. Towle, Jake M. Shank and Carl J. Hahn as administrator of the estate of Harry M. King, deceased, coming on for hearing this day, upon the verified petition of the applicants and peti-

tioners, and upon the records, files and proceedings and stenographers' notes in this action, and all of the same being carefully considered by the Court and the premises being fully understood; and the records, files, proceedings and stenographers' notes and the petition showing that these applicants and petitioners for this order had obtained prior liens over and superior to the liens of the deed of trust and supplemental mortgages and which prior liens bear date of priority as of Dec. 6th, A. D. 1915; and that the aggregate amount of these prior liens is the sum of \$40,203.16, together with the interest thereon at the rate of seven per cent per annum from the 6th day of December, 1915, down to the date of payment; and that there is now in the hands of the Special Master, subject to the order of this Court, the sum of \$24,131.60; and that it will be necessary to have approximately \$20,000.00 more paid into the hands of the Special Master subject to the order of the Court in order that the prior liens of the petitioners for this order may be paid in full with interest; and it is therefore

Ordered, adjudged and decreed: (1) That within fifteen (15) days from the service of a copy of this order upon the Electric Investment Company, the purchaser, the said Electric Investment Company shall pay into the hands of the Special Master the sum of \$20,000.00 cash, lawful money of the United States, in addition to the amount already paid into the hands of the said Special Master by the said purchaser.

(2) That on the 6th day of March, 1916, the special master herein is hereby directed to apply the sum of \$24,131.60, now in the possession of the special master, on the prior lien claims of

Guy I. Towle, in the principal sum of...\$13,963.01

Carl J. Hahn, as administrator of the es-

tate of Harry M. King, deceased, in the

principal sum of..... 6,225.15

L. M. Plumer and E. B. Scull, as executors

of the estate of L. L. McClelland, de-

ceased, in the principal sum of..... 15,625.00

And Jake M. Shank, in the principal sum

of 4,390.00

ratably in proportion to the principal sum of the said claims.

(3) That as special master herein, the special master is further hereby directed, that immediately upon the receipt of said further sum of \$20,000.00 herein ordered paid to said special master by the purchaser, the Electric Investment Company, that said special master shall forthwith apply said \$20,000.00 to the payment of the balance of the said prior lien claims of the above named prior lien claimants, without priority, in the amounts as above set forth together with the interest on said amounts at the rate of seven per cent per annum from the 6th day of December, 1915, down to the date of payment of the respective installments.

(4) That if any balance still remains in the hands of the special master, the special master shall

hold the same subject to the further order of this Court.

March 1, 1916.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed March 1, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ORDER.

It appearing that following the making of the order herein, dated the first day of March, 1916, directing the Electric Investment Company to pay to the Special Master within fifteen days from service of said order an additional Twenty Thousand Dollars (\$20,000) to be applied on the purchase price of the property sold under the decree herein, appeals were perfected from the provisions of said order directing the Special Master to make certain payments out of the moneys paid to him by said Electric Investment Company, and that supersedeas was granted in connection with said appeals staying the distribution or disbursement of the unsecured Creditors' Fund referred to in the decree and in said order, *it is now ordered:*

1. That the provisions of said order of March 1, 1916, directing the Electric Investment Company to pay to the Special Master within fifteen (15) days from the service of a copy of said order the sum of

Twenty Thousand Dollars (\$20,000), be vacated, annulled and set aside.

2. That the Special Master return to the Electric Investment Company forthwith any moneys paid to him by said Company pursuant to said order.

3. That no further payments on the purchase price shall be made by the purchaser to the Special Master until ordered or directed to do so by the Court as provided in the order of confirmation of sale.

Dated March 25, 1916.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed March 25, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity—No. 526.

AFFIDAVIT OF O. O. HAGA.

United States of America,
District of Idaho,
County of Ada,—ss.

Oliver O. Haga, being first duly sworn upon his oath, deposes and says:

I am one of the solicitors for the complainant above named and participated in the trial of the above entitled cause and am familiar with all the proceedings had and taken therein; that in the course of the trial of said cause Mr. Fraser, solicitor for the intervener Jake M. Shank, in addressing the Court in

connection with certain questions under consideration said:

MR. FRASER: "If the Court please, during the past few days I wasn't interested much and matters have come to my attention that I am not able to produce proof concerning at the present time, but in hearing that deposition read (referring to the deposition of Albert E. Smith) the party stated that these bonds were first put up as collateral security to some notes, I believe, of the Great Shoshone and Twin Falls Water Power Company, then that the National Securities Corporation purchased these bonds but they nowhere say what they paid for them. I understand that they got them for about 25 cents for each one hundred dollar bond; that is but hearsay."

The statement "for about 25 cents for each one hundred dollar bond" seemed to be an unintentional error on the part of counsel, and that he must have intended to say "\$25.00 for each one hundred dollar bond"; and, solely for the purpose of calling his attention to the fact that he had said "25 cents" when I thought he must have meant "\$25.00", I said, for the purpose of only calling his attention to the language he had used, "\$25.00", without intending thereby to make any statement or express any opinion as to what the bonds had actually sold for or as to whether they had been sold, for the deposition referred to by counsel and the proof in the case up to that time contained no reference whatever to the

bonds being pledged as collateral for notes of the Great Shoshone and Twin Falls Water Power Company.

As to the proceedings upon the application of Mr. Carter, solicitor for the Great Shoshone and Twin Falls Water Power Company, to file an answer in behalf of that Company, my recollection is very distinct as the incident seemed somewhat unusual. As I remember the proceedings, they were as follows:

On the convening of Court on the morning of October 27, 1915, (Wednesday), Mr. Carter stated to the Court that he had been out of the city for a few days and he had in his hand the answer of the Great Shoshone and Twin Falls Water Power Company to complainant's bill of complaint, and he asked leave to file it as of October 25th, whereupon the Court said in substance: "What is the answer?" And thereupon Mr. Carter read the body of the answer, as follows:

"Comes now the defendant, the Great Shoshone and Twin Falls Water Power Company, one of the defendants in the above entitled action, and answering the Bill of Complaint and the Supplemental Bill of Complaint, admits each and every allegation of said Bill of Complaint and the Supplemental Bill of Complaint as therein set forth or specified."

Thereupon the Court said in substance:

"Why do you want to file such an answer?"

Whereupon Mr. Carter replied in substance:

"I was directed to do so by the President of the Company. I have a telegram."

Mr. Carter, failing to find the telegram, said he must have left it at the office, whereupon the Court inquired:

"Who is President of the Company?"

To which Mr. Carter replied: "H. Hobart Porter."

Whereupon the Court stated that he would take the matter under advisement. And thereupon counsel for plaintiff announced that plaintiff rests.

The telegram referred to by Mr. Carter was not produced by him in connection with the above application, and nothing further took place in connection with the application of Mr. Carter to file the answer on behalf of the defendant Great Shoshone and Twin Falls Water Power Company.

OLIVER O. HAGA.

Subscribed and sworn to before me this 12th day of April, 1916.

(Seal)

EDNA L. HICE,

Notary Public.

Endorsed: Filed April 12, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity—No. 526.

PETITION FOR APPEAL.

The above named complainant conceiving itself aggrieved by the decree made and entered on the 6th

day of December, 1915, in the above entitled cause and by the order made in said cause on the first day of March, 1916, directing the Special Master named in said decree to pay out of the fund designated in said decree as the "Unsecured Creditors' Fund", Thirteen Thousand Nine Hundred Sixty-three and 1/100 Dollars (\$13,963.01) to the defendant Guy I. Towle, Six Thousand Two Hundred and Twenty-five and 15/100 Dollars (\$6,225.15) to the defendant Carl J. Hahn as administrator of the estate of Harry M. King, deceased, Fifteen Thousand Six Hundred Twenty-five Dollars (\$15,625.00) to the interveners L. M. Plumer and E. B. Scull as executors of the estate of L. L. McClelland, deceased, and Four Thousand Three Hundred and Ninety Dollars (\$4,390.00) to the intervener Jake M. Shank, does hereby appeal from said decree insofar as said decree provides that your petitioner's deeds of trust or mortgages described in said decree are not a first and prior lien upon all the personal property, assets, rights and franchises of the defendant Great Shoshone and Twin Falls Water Power Company, and insofar as said decree orders or directs that the defendants Guy I. Towle and Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, and the interveners L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, have a superior claim or lien to certain personal property of the defendant Great Shoshone and Twin Falls Water Power Company, and insofar as said decree orders and directs that certain sums shall be

paid to said defendants and interveners; and your petitioner also appeals from that certain order made and entered in the above entitled cause on the 1st day of March, 1916, ordering and directing the Special Master appointed by said decree to pay to the said defendants and interveners the following sums and amounts, to-wit: To the said Guy I. Towle, \$13,-963.01; to the said Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, \$6,225.15; to the interveners L. M. Plumer and E. B. Scull as executors of the estate of L. L. McClelland, deceased, \$15,625.00; and to the intervener Jake M. Shank, \$4,390.00, for the reasons specified in the assignment of errors which is filed herewith; and your petitioner prays that this appeal may be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree and order were based, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and your petitioner claims the benefit of and does not appeal from the provisions of said decree to which exceptions have not been taken in the assignment of errors filed herewith.

And your petitioner, desiring to supersede the execution of the said order made and entered on March 1, 1916, and the provisions of said decree directing that certain payments may be made out of the Unsecured Creditors' Fund to certain creditors of the defendant Great Shoshone and Twin Falls Water Power Company, tenders bond in such amount as

the Court may require for such purpose, and prays that with the allowance of the appeal a supersedeas may be issued.

Dated this 11th day of March, 1916.

MURRAY, PRENTICE & HOWLAND,
RICHARDS & HAGA,

Solicitors for Petitioner.

ORDER ALLOWING APPEAL.

And now, to-wit, on the 11th day of March, 1916, IT IS ORDERED that the petition be granted and the appeal be allowed as prayed for, the same to operate as a supersedeas upon the petitioner filing a bond in the sum of \$3,000.00, with sufficient sureties, to be conditioned as required by law.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed March 11, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

And now comes the complainant, The Equitable Trust Company of New York, Trustee, by its solicitors, and having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from certain provisions of the decree made and entered in the above entitled cause on the 6th day of December, 1915, and from an order made therein on the 1st day of March, 1916, directing the Special Master to make certain payments out of what is designated

in the decree as the "Unsecured Creditors' Fund", says that said provisions of the decree and the said order and the decision of the Court are erroneous and unjust to complainant, and particularly in this:

1. Because the Court erred in adjudging and decreeing that the lien of complainant under the deed of trust and indentures of mortgage foreclosed in said cause was subject and subordinate to the claims of the defendants Guy I. Towle and Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, and to the claims of the said interveners L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Jake M. Shank as to certain articles of personalty not forming a constituent part of or necessary for the maintenance, repair and operation of the hydro-electric generating, transmitting and distributing system of the Great Shoshone and Twin Falls Water Power Company.

2. Because the Court erred in not holding, adjudging and decreeing the said Guy I. Towle, Carl J. Hahn, administrator as aforesaid, L. M. Plumer and E. B. Scull, executors as aforesaid, and Jake M. Shank had no lien or claim upon any of the assets, property or rights of the defendant Great Shoshone and Twin Falls Water Power Company superior to the lien, claims and demands of complainant.

3. Because the Court erred in holding, adjudging and decreeing that the said defendants and interveners, or any of them, were entitled to contest for any reason the priority or dignity of the lien created by the deed of trust and mortgages sought to be fore-

closed in said action, upon or against the personal property, rights and assets of the defendant Great Shoshone and Twin Falls Water Power Company.

4. Because the Court erred in adjudging, decreeing, holding and deciding that there was due the defendant Guy I. Towle from the Great Shoshone and Twin Falls Water Power Company the sum of Thirteen Thousand Nine Hundred Sixty-three and 1/100 Dollars (\$13,963.01), and the defendant Carl J. Hahn as administrator of the estate of Harry M. King, deceased, the sum of Six Thousand Two Hundred and Twenty-five and 15/100 Dollars (\$6,225.15), and the interveners L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, the sum of Fifteen Thousand Six Hundred and Twenty-five Dollars (\$15,625.00), and the intervener Jake M. Shank the sum of Four Thousand Three Hundred and Ninety Dollars (\$4,390.00), or any other sum.

5. Because the Court erred in ordering, adjudging and decreeing that the Special Master appointed by said decree should pay to the defendants and interveners above mentioned the respective sums above set forth, with interest thereon out of what is denominated in said decree as the "Unsecured Creditors' Fund", or out of any other fund or proceeds from the sale of property, rights or assets of the defendant Great Shoshone and Twin Falls Water Power Company, before the amount due complainant from said defendant had been fully paid, satisfied and discharged.

6. Because the Court erred in not holding, adjudging and decreeing that if the deed of trust and mortgages sought to be foreclosed in this cause were not a first and prior lien upon all the personalty and other property of the Great Shoshone and Twin Falls Water Power Company, the proceeds of the property not subject to such lien should be paid to the Receiver of said defendant for distribution and administration in the general creditors' suit in which such Receiver had been appointed, equitably between complainant and other creditors of said defendant Great Shoshone and Twin Falls Water Power Company.

7. Because the Court erred in entering an order on or about the 23rd day of October, 1915, permitting the interveners L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, to intervene and be made parties defendant in this cause.

8. Because the Court erred in overruling and denying the motion of this complainant to dismiss the petition of said L. M. Plumer and E. B. Scull, executors as aforesaid, to intervene and be made parties defendant in said cause and to vacate and set aside the order so made, as aforesaid, on or about the 23rd day of October, 1915, permitting said interveners to intervene and be made parties defendant herein.

9. Because the Court erred in overruling and denying complainant's motion to strike out what is denominated a joint answer filed on or about the 23rd day of October, 1915, in this cause by the said interveners L. M. Plumer and E. B. Scull, executors as aforesaid.

10. Because the Court erred in denying and overruling the motion of this complainant to strike the answer of the defendant Guy I. Towle filed herein on or about the 23rd day of October, 1915.

11. Because the Court erred in denying and overruling the motion of complainant to set aside an order made *ex parte* herein on or about the 25th day of October, 1915, allowing Jake M. Shank to intervene and be made a party defendant in this cause.

12. Because the Court erred in denying and overruling the motion of complainant to dismiss the petition in intervention filed by the said Jake M. Shank in this cause.

13. Because the Court erred in permitting the said Jake M. Shank to intervene and be made a party defendant in said cause.

14. Because the Court erred in denying and overruling the motion of complainant to strike out what is denominated an answer filed for or on behalf of said Jake M. Shank on or about the said 25th day of October, 1915.

15. Because the Court erred in not entering judgment in favor of complainant for the full amount of the bonds issued and outstanding, to-wit, \$2,230,000.00, with interest thereon from the 1st day of May, 1914, at the rate of five per cent per annum.

Wherefore, complainant prays that the decree herein be modified so as to provide that complainant's deed of trust and supplemental mortgages sought to be foreclosed in this cause are a lien upon

all the property, real, personal and mixed, rights and assets of the defendant Great Shoshone and Twin Falls Water Power Company, prior and superior to any and all liens, claims and demands of the said defendants and interveners; and so that none of the proceeds from the sale of such property, rights and assets shall be paid to the defendants and interveners, or any of them, until all the claims and demands of complainant under said deed of trust and supplemental mortgages have been fully paid, satisfied and discharged; and that the order made and entered herein on the 1st day of March, 1916, be vacated and set aside.

Dated this 11th day of March, 1916.

MURRAY, PRENTICE & HOWLAND,
RICHARDS & HAGA,

Solicitors for Complainant, Equitable
Trust Company of New York, Trustee.

Endorsed: Filed March 11, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

In Equity—No. 526.

BOND ON APPEAL.

Know all men by these presents, That we, The Equitable Trust Company of New York, a corporation organized under the laws of the State of New York, as principal, and the American Surety Company of New York, a corporation organized under

the laws of the State of New York, as surety, are held and firmly bound unto the defendants Guy I. Towle and Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, and the interveners L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, and the other defendants above named, as their respective interests may appear under the decree entered in said cause on the 6th day of December, 1915, and under the order made and entered on the 1st day of March, 1916, and hereinafter mentioned, in the penal sum of Three Thousand Dollars (\$3,000.00), to be paid to the said defendants and interveners as their respective interests may appear, and to their and each of their executors, administrators, successors or assigns, not exceeding, however, in the aggregate the said sum of \$3,000.00, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this eleventh day of March, in the year of our Lord, One Thousand Nine Hundred and Sixteen.

The condition of this obligation is such, that:

Whereas, the above named The Equitable Trust Company of New York, the said principal, as Trustee, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree made and entered in said cause on the 6th day of December, 1915, and from a certain order made in said cause on the 1st day of March, 1916,

by the United States District Court for the District of Idaho, Southern Division;

Now, therefore, if the above named principal, The Equitable Trust Company of New York, shall prosecute its said appeal to effect, and, if it fail to make its plea good, shall answer all damages and costs, then the above obligation to be void, otherwise the same shall be and remain in full force and virtue.

In witness whereof, the said principal has caused its name to be hereunto subscribed by its duly authorized solicitors, and the said surety has caused its name to be hereunto subscribed by its duly authorized officers and its corporate seal affixed, the day and year first above written.

THE EQUITABLE TRUST COMPANY OF
NEW YORK, AS TRUSTEE.

By O. O. HAGA,

One of its Solicitors.

THE AMERICAN SURETY COMPANY OF
NEW YORK.

By BRADLEY SHEPPARD,

Resident Vice-President.

Attest:

OLIVER O. HAGA,

Resident Assistant Secretary.

The foregoing bond is hereby approved to operate as a supersedeas, and all orders heretofore made relative to the payment or disbursement of the Unsecured Creditors' Fund mentioned in the decree herein and the provisions of the decree relative to disbursement of such fund, are hereby stayed to the end

that such fund may remain intact until the determination of the appeal.

Dated this 11th day of March, 1916.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed March 14, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

PRAECIPE FOR RECORD ON APPEAL.

To the Clerk of the above-entitled Court:

You will please prepare the record on the appeal of the complainant The Equitable Trust Company of New York, taken in the above entitled cause from the decree entered therein on December 6, 1915, and order made pursuant thereto on March 1, 1916. Such record is to consist of the following:

1. Bill of Complaint, including those portions of Exhibits "A", "B" and "C" as hereinafter noted.
2. Supplemental Bill of Complaint.
3. That portion of the Amendments to Bill of Complaint as hereinafter noted.
4. Appearance of Receiver.
5. Answer of Receiver.
6. Appearance of Great Shoshone and Twin Falls Water Power Company.
7. Answer of Great Shoshone and Twin Falls Water Power Company.
8. Answer of Carl J. Hahn, and Exhibit.
9. Reply of The Equitable Trust Company of New York to Answer of Carl J. Hahn.

10. Answer of Guy I. Towle.
11. Motion of The Equitable Trust Company to strike Answer of Guy I. Towle.
12. Petition of L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, to intervene.
13. Order allowing L. M. Plumer and E. B. Scull, executors aforesaid, to intervene.
14. Answer of L. M. Plumer and E. B. Scull, executors aforesaid.
15. Motion of The Equitable Trust Company of New York to vacate order allowing L. M. Plumer and E. B. Scull to intervene and to dismiss their petition and answer.
16. Petition of Jake M. Shank to intervene.
17. Order allowing Jake M. Shank to intervene
18. Answer of Jake M. Shank.
19. Motion of The Equitable Trust Company to dismiss answer of Jake M. Shank.
20. Statement of evidence and order settling statement.
21. Memorandum decision in reference to bonds and personalty.
22. Stipulation relative to selling property as an entirety.
23. Decree of December 6, 1915.
24. Stipulation relative to value of personalty.
25. Order of Court relative to apportioning proceeds.
26. Notice of confirmation of sale.
27. Motion of confirmation of sale.
28. Order of confirmation of sale.

29. Notice of appearance of the Electric Investment Company.

30. Petition for order to Special Master to pay prior liens.

31. Order relative to Master paying prior liens dated March 1, 1916.

32. Order annulling portion of order of March 1, 1916.

33. Affidavit of O. O. Haga.

34. All papers in connection with this appeal.

Petition of The Equitable Trust Company
on appeal.

Order allowing appeal of The Equitable
Trust Company.

Assignment of Errors, Equitable Trust
Company on appeal.

Citation of Equitable Trust Company on
appeal.

Bond of Equitable Trust Company on ap-
peal.

In preparing the above record, you will please omit the title to all pleadings, except the first, but in lieu thereof insert the words, "Title of Court and Cause", to be followed by the name of the pleading or instrument. You will also please omit the verification to all pleadings, but in lieu thereof, wherever the pleadings are verified, the words, "Duly verified".

In reference to Exhibit "A" of the Bill of Complaint above named, you will please omit the following, commencing at the middle of page 36 and ending near the top of page 42, and in lieu thereof insert the words: "There is here omitted a specific descrip-

tion of certain property included in the Amendments to the Bill of Complaint." You will also omit, commencing at the middle of page 46 and ending near the top of page 104, and in lieu thereof insert the words: "There are here omitted certain provisions relative to covenants, certification, registration and exchange of bonds, sub-companies, and management of collateral and pledged bonds." You will also please omit the provisions, commencing at about the middle of page 109 and ending about the middle of page 113. You will also please omit, commencing near the middle of page 116 and ending near the middle of page 147, and in lieu of the last omission insert: "There are here omitted certain provisions as to waiver of individual liability, redemption of bonds, sub-companies, release of property, and provisions as to bonds and trustees."

In reference to Exhibit "B" attached to the Bill of Complaint, you will please omit the whole thereof and in lieu insert the following words: "This is an indenture dated June 21, 1911, made by the Great Shoshone and Twin Falls Water Power Company to The Trust Company of America and James D. O'Neil, Trustees, conveying certain specific real property, described in complainant's Amendments to its Bill of Complaint on file herein, pursuant to the provisions of and upon the trusts and under the provisions set forth in the Mortgage or Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company to The Trust Company of America and James D. O'Neil, Trustees, dated May 1, 1910, identical with the copy thereof attached to the Bill of

Complaint of the complainant herein and marked Exhibit 'A'. Signed by R. L. Kester, Vice-President, and W. B. McCain, Secretary of Great Shoshone and Twin Falls Water Power Company, and sealed with the seal of said company, and duly acknowledged."

In lieu of Exhibit "C" you will please insert: "Exhibit C". "This is a Suplmental Mortgage dated April 7, 1913, made by the Great Shoshone and Twin Falls Water Power Co. to The Equitable Trust Co. of New York and James D. O'Neil, as Trustees, conveying certain specific property, described in the complainant's Amendments to its Bill of Complaint on file herein, pursuant to the provisions of and upon the trusts and under the provisions set forth in the Mortgage or Deed of Trust dated May 1st, 1910, from the Great Shoshone and Twin Falls Water Power Company to The Trust Company of America and James D. O'Neil, as Trustees, identical with the copy thereof attached to the Bill of Complaint herein and marked 'Exhibit A'. Signed, R. L. Kester, Vice-President, W. B. McCain, Secretary, Great Shoshone and Twin Falls Water Power Company, and sealed with the seal of said Company, and duly acknowledged."

In reference to the Amendments to the Bill of Complaint, you will please omit commencing at the top of page three and ending at the bottom of page 39, and insert in lieu thereof the following: "There is omitted here a specific description of power sites, stations, sub-stations, other real estate, buildings, transmission lines, franchises, water permits and

rights, all of which is also included in the general description that follows.”

You will please include as part of this record, this praecipe, together with all signatures thereto.

In reference to instrument numbered twenty-three, being the Decree of December 6th, 1915, you will please omit all the descriptive matter, commencing on page three thereof and ending at the top of page twenty-seven, inserting in the lieu thereof the following words: “There is here omitted a specific description of power sites, stations, sub-stations, other lands, buildings, transmission lines, franchises, water permits and rights, as set forth in the Amendments to the Bill of Complaint of the complainant herein, and followed by the general description in the following paragraph.”

You will also please omit the word “other” in the first line of the last paragraph of the Amendments to the Bill of Complaint on file herein.

In reference to the answer of Jake M. Shank, you will please omit the paragraphs after the words “this defendant says” from the first to the nineteenth paragraph inclusive and from the twenty-third paragraph to the signatures of Jake M. Shank and his attorney, and in lieu thereof insert the words: “The paragraphs here omitted are identical with the paragraphs in the joint answer of L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, set forth in this record, from paragraph one to paragraph nineteen inclusive and from paragraph twenty-three to the signatures of said L. M. Plumer and E. B. Scull, excepting that where the

terms defendants or correlative plurals are used, the same appear in the singular in this answer”.

In reference to the answer of Guy I. Towle, you will please omit from paragraph one commencing at the third line of the second page, to the paragraph numbered nineteen inclusive, and from paragraph twenty-three to the signatures of Guy I. Towle and his attorneys, and in lieu thereof insert the words, “The paragraphs omitted here are identical with the paragraphs in the joint answer of L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, set forth in this record, from paragraph one to paragraph nineteen inclusive and from paragraph twenty-three to the signatures of the said L. M. Plumer and E. B. Scull, and their attorneys”.

RICHARDS & HAGA,

Solicitors for The Equitable Trust Company of New York.

We waive our right to file praecipis, and join in the above praecipe.

ALFRED A. FRASER,

By MARTIN & CAMERON,

Solicitors for Jake M. Shank.

MARTIN & CAMERON,

Solicitors for L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased.

KARL PAINE,

Solicitor for Guy I. Towle.

JAMES H. WISE,

By MARTIN & CAMERON,

Solicitors for Carl J. Hahn.

Endorsed: Filed April 19, 1916.

W. D. McReynolds, Clerk.

CITATION.

United States of America,—ss.

To Great Shoshone and Twin Falls Water Power Company, a corporation, William T. Wallace, as Receiver of Great Shoshone and Twin Falls Water Power Company, Guy I. Towle, and Carl J. Hahn, administrator of the estate of Harry M. King, deceased, defendants, and L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, Jake M. Shank, and American Water Works and Electric Company, a corporation, interveners, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco in the State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein Equitable Trust Company of New York, as sole Trustee under the deed of trust made by Great Shoshone and Twin Falls Water Power Company dated May 1st, 1910, and supplemental mortgages dated June 21st, 1911, and April 7th, 1913, is appellant, and Great Shoshone and Twin Falls Water Power Company, a corporation, William T. Wallace, as Receiver of Great Shoshone and Twin Falls Water Power Company, Guy I. Towle, Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, L. M. Plumer and E. B. Scull, exe-

cutors of the estate of L. L. McClelland, deceased, Jake M. Shank, and American Water Works and Electric Company are respondents, to show cause, if any there be, why the decree and order in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable Frank S. Dietrich, United States District Judge for the District of Idaho, this 14th day of March, 1916, and of the Independence of the United States the one hundred and fortieth year.

FRANK S. DIETRICH,

(Seal)

District Judge.

Attest:

W. D. McREYNOLDS, Clerk.

Service of the foregoing Citation and receipt of copy thereof admitted this 15th day of March, 1916.

P. B. CARTER,

Solicitor for Great Shoshone and Twin Falls
Water Power Company.

S. H. HAYS,

Solicitor for William T. Wallace, Receiver
of Great Shoshone and Twin Falls Wa-
ter Power Company.

KARL PAINE,

Solicitor for Guy I. Towle.

JAMES H. WISE,

By MARTIN & CAMERON,

Solicitor for Carl J. Hahn, Administrator
of the Estate of Harry M. King, de-
ceased.

MARTIN & CAMERON,
Solicitors for L. M. Plumer and E. B.
Scull, Executors of the Estate of J. J.
McClelland, Deceased.

ALFRED A. FRASER,
Solicitor for Jake M. Shank.

WYMAN & WYMAN,
Solicitors for American Water Works and
Electric Company.

Endorsed: Filed March 22, 1916.

W. D. McReynolds, Clerk.



*In the District Court of the United States for the
District of Idaho, Southern Division.*

THE EQUITABLE TRUST COMPANY OF NEW
YORK, as sole Trustee under a Deed of Trust
made by Great Shoshone and Twin Falls Water
Power Company, dated May 1, 1910, and Supple-
mental Mortgages dated June 21, 1911, and April
7, 1913, *Complainant,*

vs.

GREAT SHOSHONE AND TWIN FALLS WAT-
ER POWER COMPANY, a corporation, WIL-
LIAM T. WALLACE as Receiver of Great Sho-
shone and Twin Falls Water Power Company,
GUY I. TOWLE, and CARL J. HAHN as Admin-
istrator of the estate of Harry M. King, deceased,
Defendants.

L. M. PLUMER and E. B. SCULL, Executors of
the estate of L. L. McClelland, deceased, and
JAKE M. SHANK, *Interveners,*

and

AMERICAN WATER WORKS AND ELECTRIC
COMPANY, a Corporation,

Intervener.

In Equity—No. 526.

STATEMENT ON HEARING OF PETITION OF
AMERICAN WATER WORKS AND ELEC-
TRIC COMPANY TO INTERVENE.

Be it remembered that on the coming in of the
Court at ten o'clock on the morning of the 14th day
of February, 1916, the American Water Works and
Electric Company presented to the Court its petition

to intervene and be made a party and filed its complaint in intervention in this cause, which petition is in words and figures as follows:

(Title of Court and Cause.)

PETITION OF THE AMERICAN WATER
WORKS AND ELECTRIC COMPANY TO IN-
TERVENE AND BE MADE PARTY-DEFEND-
ANT.

*To the Honorable, the Judge of the District Court of
the United States, for the District of Idaho, South-
ern Division.*

The petition of American Water Works and Electric Company a corporation, respectfully shows:

I.

That your petitioner now and during all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Virginia.

II.

That heretofore Guy I. Towle brought in this Court a suit in the nature of a general creditors' suit against the Great Shoshone and Twin Falls Water Power Company which is now pending; that thereupon a Receiver was duly appointed therein who under the directions of this Court took and still retains possession of the assets of the Great Shoshone and Twin Falls Water Power Company.

III.

That thereafter notice was published and given by the said Receiver, acting under the direction of the

Court, requiring all creditors of said defendant to file proof of their respective claims within a time fixed in said notice; that pursuant thereto your petitioner and other creditors within such period presented their several claims to the Receiver and filed them in the manner and form as required by said notice; that the claim of your petitioner is just and no objection has been filed against the allowance of the same;

IV.

That after the bringing of the said suit hereinbefore referred to and the appointment of a Receiver therein, suit was brought for the foreclosure of a mortgage given by the said Great Shoshone and Twin Falls Water Power Company upon all of its properties and such proceedings were thereafter had, that the said mortgage was foreclosed and the said property of said defendant was under the order of this Court sold by a Master; that notice of motion for the confirmation of such sale has been given and hearing thereon is now set for Feb'y 14, 1916; that, so far as your petitioner knows, there are no objections to such confirmation except such as may be involved in the matters set forth in the petition and the Bill in Intervention herewith presented.

V.

That your petitioner is interested in the said property and in the proceeds thereof in common with all other general creditors of the Great Shoshone and Twin Falls Water Power Company; That the said

proceeds are about to be paid by the purchaser at such sale to the Master appointed by this Court, to conduct the same, and by such Master such proceeds are about to be distributed to a small number of said general creditors hereinbefore referred to and to the exclusion of your petitioner and the greater part of such general creditors; That the particular facts with respect to the said matters hereinbefore referred to are more fully set forth in the bill of intervention herewith presented.

Your petitioner therefore prays that it may be permitted to intervene in said action and to file its said bill of intervention to the end that its rights and those of all other general creditors of said Great Shoshone & Twin Falls Water Power Company may be protected and preserved and that the said fund hereinbefore referred to be not distributed or otherwise disposed of until after the hearing upon the said bill in intervention, and that it then be paid to the Receiver hereinbefore mentioned for distribution to the general creditors of said Great Shoshone and Twin Falls Water Power Company.

WYMAN & WYMAN,
Solicitors for American Water Works and
Electric Company.

FRANK T. WYMAN,
of Counsel.

(Duly verified.)

The complaint in intervention referred to and submitted to the Court is in words and figures as follows:

(Title of Court and Cause.)

In Equity—No. 526.

COMPLAINT IN INTERVENTION OF AMERICAN WATER WORKS AND ELECTRIC COMPANY.

To the Honorable, the Judge of the District Court of the United States for the District of Idaho, Southern Division:

The American Water Works and Electric Company, a corporation duly organized under the laws of the State of Virginia and a resident and citizen of said State, files its Complaint in Intervention against Guy I. Towle, Carl J. Hahn as administrator of the estate of Harry M. King, deceased, defendants in said cause, and L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, interveners in said cause.

And thereupon your orator complains and says:

I.

That heretofore, to-wit, on the 2nd day of November, A. D. 1914, the said Guy I. Towle on behalf of himself and all other creditors of the said Great Shoshone and Twin Falls Water Power Company (hereinafter called the Company), commenced in this Court a general creditors' suit against said Power Company, being Equity Cause No. 509, which said action is still pending in this Court. That in his bill of complaint in said action the said Guy I. Towle alleged and showed that said Power Company was indebted to him in the sum of \$12,857.29, with interest thereon, and that said Power Company was also

indebted to a large number of other persons, partnerships and corporations, in an amount far in excess of the reasonable value of its assets, and that said Power Company was insolvent and unable to meet its obligations, and that in order to protect the rights of the creditors of said Power Company and to prevent any of said creditors obtaining an unfair or unconscionable advantage or preference over other creditors by attachment, or otherwise, a receiver should be appointed of all the property, rights and assets of said corporation to take charge of and preserve the property of said Power Company and continue the operation thereof for the benefit of its creditors; and said Towle alleged such other facts and prayed for such other relief as is usual and customary in a bill of complaint in a general creditors' suit against public service corporations. For a full and particular statement of the matters set up in said bill your intervener prays leave to refer to said bill on file with the Clerk of this Court with the same force and effect as if the matters therein set forth were herein set out at large.

II.

That thereafter and on said 2nd day of November the said Power Company entered its appearance in said cause by answer admitting all the allegations of the bill and joining in the request for the appointment of a receiver, and thereupon the said William T. Wallace was on said 2nd day of November, 1914, duly appointed by this Court receiver of all the property, real, personal and mixed, equities, rights and

franchises of said corporation, and immediately qualified as such receiver by giving the bond and taking the oath required, and thereupon took possession, charge and control of all of said property, rights and assets, and ever since has been and still is in the possession and control thereof as receiver of this Court appointed in said cause.

III.

That in the order appointing the said William T. Wallace receiver of said Power Company, it is ordered, adjudged and decreed that all persons, firms, and corporations whatsoever, be and by said decree were restrained and enjoined from interfering with, attaching, levying upon, seizing, or in any manner whatsoever disturbing any of the properties, rights or franchises of said Power Company.

IV.

That thereafter, to-wit, on the 4th day of May, 1915, this Honorable Court entered an order in said cause (Equity Cause No. 509) directing the receiver of said Power Company to notify all creditors of said Power Company to file their claims with said Receiver on or before the 10th day of August, 1915, and that all claims not presented for filing with the receiver or presented by intervention within said time should be barred from any participation in the assets of the receivership estate.

V.

That thereafter and on or about the 19th day of May, 1915, the defendant, C. J. Hahn, pursuant to

the order of the Court made as aforesaid and a notice given by said receiver, filed his claim with said receiver claiming that said Power Company was indebted to him in the sum of about \$6,000.00, the exact amount thereof being to your intervener unknown.

VI.

That thereafter and on the 5th day of August, 1915, this intervener, American Water Works and Electric Company, filed its claim with said receiver pursuant to said order of Court and the notice given thereunder by said receiver, showing that said Power Company was indebted to this intervener in the sum of \$1,268,434.66, all of which was and is justly due from said Power Company to this intervener.

VII.

That thereafter and on the 10th day of August, 1915, the said L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, filed their claim with said receiver in the sum of \$20,000.00, alleged to be due from said Power Company under a note dated July 2nd, 1914, from said Power Company to the said L. L. McClelland, and said L. M. Plumer and E. B. Scull, executors as aforesaid, also filed with the Clerk of said Court a pleading denominated a cross bill of complaint generally describing the said claim and further stating therein that said executors were entitled to participate in the distribution of the assets of said Power Company and to receive their proportionate share thereof to which the then value of said claim might

entitle them; and that on the 11th day of August, 1915, said L. M. Plumer and E. B. Scull, executors as aforesaid, further filed with the Clerk of said Court their petition to intervene in said cause for the alleged purpose of setting up their said claim, to the end that they might be permitted to participate in the distribution of the assets of the receivership estate in said cause.

VIII.

That thereafter and on the 14th day of August, 1915, the said Jake M. Shank filed with said receiver his claim against said Power Company alleging that there was due him upwards of \$4,000.00, from said Power Company, the exact amount thereof being to this intervener unknown.

IX.

That thereafter and on the 16th day of October, 1915, as this intervener is informed and believes, the said L. M. Plumer and E. B. Scull, executors aforesaid, without notice to or knowledge thereof by this intervener presented their said claim to the Judge of this Court at Chambers *ex parte*, and obtained the allowance of their said claim in the sum of \$15,625.00; and the said Guy I. Towle likewise without notice to or knowledge thereof by this intervener presented *ex parte* and obtained the allowance of his claim in the sum approximately \$13,963.00; and or about the 25th day of October, 1915, the said Jake M. Shank without notice to or knowledge thereof by this intervener, presented *ex parte* his said claim and obtained the allowance thereof in the sum of approximately \$4,390.00.

X.

That all of said claims and a large number of other claims aggregating upwards of \$4,000,000.00, the exact amount thereof being to your intervener unknown, were filed with the receiver in said cause pursuant to the order of the Court and the notice of the receiver requiring the filing of claims against the Power Company for allowance by the receiver and Court, to the end that the same might be entitled to share in the equitable distribution of the assets of such receivership estate pursuant to law and the principles of equity governing the administration and distribution of assets of insolvent debtors by Courts of Equity in suits brought by one or more creditors in behalf of themselves and all other creditors of the insolvent debtor.

XI.

That thereafter and on the 24th day of December, 1915, this Honorable Court made and entered an order in said cause that all persons interested and who desired to contest the validity or the amount due upon any claim filed with the receiver aforesaid, should on or before the 17th day of January, 1916, file in said cause their objections thereto, and that a hearing thereon should be had on the 14th day of February, 1916, at 2 o'clock P. M.

XII.

That on the 14th day of April, 1915, the said Equitable Trust Company of New York as sole Trustee under certain deeds of trust and mortgages given by said Power Company, commenced this action

against said Power Company and the said William T. Wallace as receiver thereof, and the said Guy I. Towle, and Carl J. Hahn as administrator of the estate of Harry M. King, deceased, for the foreclosure of certain deeds of trust and mortgages given by said Power Company and purporting to be first and prior liens upon all the property, rights and assets of said Power Company and on the earnings and income thereof, and which said mortgages and deeds of trust were given to secure the payment of certain first mortgage bonds of said Power Company alleged to be outstanding and unpaid to the amount of \$2,230,000.00, and such proceedings were had in such cause that the same was set for trial on the merits on or about the 26th day of October, 1915, the said Power Company making no defense thereto, but admitted by its answer all the allegations of the bill of complaint, as this intervener is informed and believes and so alleges the fact to be.

XIII.

That the said L. M. Plumer and E. B. Scull, executors as aforesaid, and the said Carl J. Hahn, administrator as aforesaid, and the said Guy I. Towle, and Jake M. Shank, without notice to or knowledge thereof by this intervener or any of the other creditors of said Power Company, as your intervener is informed and believes and so alleges the fact to be, having acquired certain information relative to certain property of said Power Company upon which a lien or a preference might be acquired superior to the lien of the mortgages or deeds of trust so sought to be

foreclosed by said Equitable Trust Company, by complaint in intervention or answer in this cause alleged and showed that because the said deeds of trust and mortgages had not been executed or filed as required by the laws of the State of Idaho relative to chattel mortgages, the same did not constitute a lien or claim upon the personal property of said Power Company, but that the said interveners and defendants, to-wit, the said Guy I. Towle, Carl J. Hahn, administrator as aforesaid, Jake M. Shank, L. M. Plumer and E. B. Scull, executors as aforesaid, as general creditors of said Power Company had a superior lien or claim upon such personal property; and such proceedings were had upon the complaint in intervention and answer so filed that it was adjudged and decreed upon the issues so raised that the mortgages or deeds of trust so sought to be foreclosed by said Equitable Trust Company had not been execute dor filed as required by the chattel mortgage statutes of the State of Idaho, and that the lien or claim of said creditors as against certain personal property of said Power Company was prior and superior to the lien of said mortgages and deeds of trust; and it was adjudged and decreed in the decree of foreclosure so entered that the proceeds from the sale of such personal property should be placed by the Special Master appointed for conducting such sale in a fund known and designated in said decree as the "Unsecured Creditors' Fund", and that out of such fund said Special Master should pay to the said Guy I. Towle \$13,963.01, to the said Carl J. Hahn,

administrator as aforesaid, \$6,225.15, to the said L. M. Plumer and E. B. Scull, executors as aforesaid, \$15,625.00, to the said Jake M. Shank, \$4,390.00, with interest at 7 per cent per annum from the date of said decree, to-wit, December 6th, 1915.

XIV.

That such personal property has been sold by said Special Master, together with the other property of said Power Company, and the amount realized therefrom was the sum of \$45,000.00, which is the amount to be placed in said "Unsecured Creditors' Fund" to be paid out and distributed as provided in said decree and as above set forth, and the said sum of \$45,000.00 the full amount realized from the sale of the property and assets of said Power Company upon which the said deeds of trust and mortgages so sought to be foreclosed were not decreed a first and prior lien, being the amount realized from the property and assets of the Power Company available for the payment of the claims of other creditors than the said complainant; that in addition to said sum of \$45,000 this intervener is informed and believes that there is approximately \$25,000.00 in the hands of the receiver of said Power Company that may also be available for the payment of claims of general creditors, making in the aggregate approximately \$70,000.00 available for the payment of claims aggregating upwards of \$4,000,000.00; that the other property of said Power Company subject to complaint's deeds of trust and mortgages was sold for \$2,000,000.00 by the Special Master under the decree

of foreclosure, which amount was less, as this intervener is informed and believes and so alleges the fact to be, than is due the said plaintiff under said decree of foreclosure.

XV.

That the general creditors of said Power Company will suffer a large loss as the assets available for the payment of their claims amount to only about 2 per cent of the face of said claims; that any payments made to the said Jake M. Shank, Guy I. Towle, Carl J. Hahn, administrator as aforesaid, and L. M. Plumer and E. B. Scull, executors as aforesaid, in excess of their pro rata and proportionate part of the assets available for the claims of general creditors based upon the aggregate amount of the claims of the said general creditors allowed and approved by this Honorable Court will in effect be a payment by the other general creditors to the said Jake M. Shank, Guy I. Towle, Carl J. Hahn, L. M. Plumer and E. B. Scull, and reduce accordingly the amount that can be received by or paid to other general creditors.

XVI.

That the provisions of said decree of December 6th, 1915, giving to the said Guy I. Towle, Jake M. Shank, Carl J. Hahn, L. M. Plumer and E. B. Scull any preference or priority whatsoever over other general creditors of the Power Company or directing the Special Master to make any payments whatsoever to them, are not binding upon this intervener or other general creditors of said Power Company who

were not parties to said cause, but said provisions are as to this intervener and other general creditors void and ineffectual; that to permit such payments to be made as in said decree provided and to permit the said Guy I. Towle, Jake M. Shank, Carl J. Hahn, L. M. Plumer and E. B. Scull to receive more than their proportionate part of the fund available for the payment of general creditors of said Power Company would be unconscionable, unfair and unjust; that the said claimants who were by said decree allowed a preference as aforesaid over other general creditors had invoked the aid and jurisdiction of this Court in said general creditors suit and sought and obtained the benefit of such suit and by their acts and conduct in said cause acquiesced in and consented to the administration of the affairs of said Power Company for the benefit of all creditors and on the plan of the equitable and pro rata distribution to all creditors of all the available assets of said Power Company; that the attempt of said Guy I. Towle, Jake M. Shank, Carl J. Hahn, L. M. Plumer and E. B. Scull to obtain an advantage for themselves over other general creditors by intervention in such foreclosure suit is unfair and unjust as to other general creditors, and they should in equity and good conscience be held estopped from claiming any preference as to the fund so obtained in such foreclosure suit for the payment of their claims and designated in said decree as the "Unsecured Creditors' Fund", but such fund should be adjudged and decreed by the Court to be paid over by the Special Master to

the receiver in general creditors' suit, Equity Cause No. 509, to be there administered, paid out and distributed equitably and pro rata between all general creditors of said Power Company with such provision as may be equitable and fair for reimbursing the said Guy I. Towle, Jake M. Shank, Carl J. Hahn, L. M. Plumer and E. B. Scull, for any and all costs, expenses, outlays, and attorney fees as may have been incurred by them in such intervention and in obtaining such "Unsecured Creditors' Fund" for the benefit of the general creditors of said Power Company, and this intervener hereby offers to do equity and to pay its proportionate part of all such costs, expenses, outlays and attorneys' fees.

Wherefore, this intervener, American Water Works and Electric Company, prays:

1. That it be adjudged and decreed that the said Guy I. Towle, Carl J. Hahn, administrator as aforesaid, L. M. Plumer and E. B. Scull, executors as aforesaid, and Jake M. Shank, have not, nor has any one of them, any preference or priority over other general creditors of the Power Company as to money realized from the sale of personal property described in Paragraph II. of the decree herein, which money constitutes what was in said decree denominated the "Unsecured Creditors' Fund".

2. That the Special Master be ordered and directed to pay the money placed in said fund, after deducting the expenses and charges to be paid out of the same under the terms of said decree, to William T. Wallace, Receiver of Great Shoshone and Twin Falls

Water Power Company in Equity Cause No. 509; the same to be held and distributed by said receiver under such orders and directions as may be made in said cause.

3. And for such other relief as may be meet and proper under the circumstances, and this your intervener will ever pray.

AMERICAN WATERS WORKS AND
ELECTRIC COMPANY,

By WYMAN & WYMAN, Its Solicitors.

FRANK T. WYMAN, of Counsel.

(Duly verified.)

Thereupon the Court considered the said petition and complaint in intervention and held the same insufficient and granted the said American Water Works and Electric Company additional time in which to make a further showing. No objections having been made to the claim of the American Water Works and Electric Company, which claim is hereinafter set out in full, within the time prescribed by the order of December 24, 1915, the same was on the said 14th day of February, 1916, by the Court deemed to be allowed and approved.

Thereafter on the 28th day of February, 1916, said American Water Works and Electric Company presented to the Court its amended complaint in intervention which is in words and figures as follows:

(Title of Court and Cause.)

COMPLAINT IN INTERVENTION OF AMERICAN WATER WORKS AND ELECTRIC COMPANY.

To the Honorable, the Judge of the District Court of the United States for the District of Idaho, Southern Division:

The American Water Works and Electric Company, a corporation duly organized under the laws of the State of Virginia, and a resident and citizen of said State, upon leave of Court first had filed its Complaint in Intervention against Guy I. Towle, Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, defendants in said cause, and L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, interveners in said cause.

And thereupon your orator complains and says:

I.

That heretofore, to-wit, on the 2nd day of November, A. D. 1914, the said Guy I. Towle, on behalf of himself and all other creditors of the said Great Shoshone and Twin Falls Water Power Company (hereinafter called the Company) commenced in this Court a general creditors' suit against said Power Company, being Equity Cause No. 509, which said action is still pending in this Court. That in his bill of complaint in said action the said Guy I. Towle alleged and showed that said Power Company was indebted to him in the sum of \$12,857.29, with interest thereon, and that said Power Company was also

indebted to a large number of other persons, partnerships and corporations in an amount far in excess of the reasonable value of its assets, and that said Power Company was insolvent and unable to meet its obligations, and that in order to protect the rights of the creditors of said Power Company and to prevent any of said creditors obtaining an unfair or unconscionable advantage or preference over other creditors by attachment, or otherwise, a receiver should be appointed of all the property, rights and assets of said corporation to take charge of and preserve the property of said Power Company and continue the operation thereof for the benefit of its creditors; and said Towle alleged such other facts and prayed for such other relief as is usual and customary in a bill of complaint in a general creditors' suit against public service corporations, for a full and particular statement of the matters set up in said bill your intervener prays leave to refer to said bill on file with the Clerk of this Court with the same force and effect as if the matters therein set forth were herein set out at large.

II.

That thereafter and on said 2nd day of November, the said Power Company entered its appearance in said cause by answer admitting all the allegations of the bill and joining in the request for the appointment of a receiver, and thereupon the said William T. Wallace was on said 2nd day of November, 1914, duly appointed by this Court receiver of all the property, real, personal and mixed, equities, rights and

franchises of said corporation, and immediately qualified as such receiver by giving the bond and taking the oath required, and thereupon took possession, charge and control of all of said property, rights and assets, and ever since has been and still is in the possession and control thereof as receiver of this Court appointed in said cause.

III.

That in the order appointing the said William T. Wallace receiver of said Power Company, it is ordered, adjudged and decreed that all persons, firms and corporations whatsoever, be and by said decree were restrained and enjoined from interfering with, attaching, levying upon, seizing, or in any manner whatsoever disturbing any of the properties, rights, or franchises of said Power Company.

IV.

That thereafter, to-wit, on the 4th day of May, 1915, this Honorable Court entered an order in said cause (Equity Cause No. 509) directing the receiver of said Power Company to notify all creditors of said Power Company to file their claims with said Receiver on or before the 10th day of August, 1915, and that all claims not presented for filing with the receiver or presented by intervention within said time should be barred from any participation in the assets of the receivership estate.

V.

That thereafter and on or about the 19th day of May, 1915, the defendant, C. J. Hahn, pursuant to

the order of the Court made as aforesaid and a notice given by said receiver, filed his claim with said receiver claiming that said Power Company was indebted to him in the sum of about \$6,000.00, the exact amount thereof being to your intervener unknown.

VI.

That thereafter and on the 5th day of August, 1915, this intervener, American Water Works and Electric Company, filed its claim with said receiver pursuant to said order of Court and the notice given thereunder by said receiver, showing that said Power Company was indebted to this intervener in the sum of \$1,268,434.66, all of which is, and ever since a time prior to August 1st, 1915, has been justly due from said Power Company to this intervener.

VII.

That thereafter and on the 10th day of August, 1915, the said L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, filed their claim with said receiver in the sum of \$20,000.00, alleged to be due from said Power Company under a note dated July 2nd, 1914, from said Power Company to the said L. L. McClelland, and said L. M. Plumer and E. B. Scull, executors as aforesaid, also filed with the Clerk of said Court a pleading denominated a cross bill of complaint generally describing the said claim and further stating therein that said executors were entitled to participate in the distribution of the assets of said Power Company

and to receive their proportionate share thereof to which the then value of said claim might entitle them; and on the 11th day of August, 1915, said L. M. Plumer and E. B. Scull, executors as aforesaid, further filed with the Clerk of this Court, their petition to intervene in said cause for the alleged purpose of setting up their said claim, to the end that they might be permitted to participate in the distribution of the assets of the receivership estate in said cause.

VIII.

That thereafter and on the 14th day of August, 1915, the said Jake M. Shank filed with said receiver his claim against said Power Company alleging that there was due him upwards of \$4,000.00 from said Power Company, the exact amount thereof being to this intervener unknown.

IX.

That thereafter and on the 16th day of October, 1915, as this intervener is informed and believes, the said L. M. Plumer and E. B. Scull, executors aforesaid, without notice to or knowledge thereof by this intervener presented their said claim to the Judge of this Court at Chambers, *ex parte*, and obtained the allowance of their said claim in the sum of \$15,625.00; and the said Guy I. Towle likewise without notice to or knowledge thereof by this intervener presented *ex parte* and obtained the allowance of his claim in the sum of approximately \$13,963.00; and on or about the 25th day of October, 1915, the said Jake M. Shank without notice to or knowledge

thereof by this intervener, presented *ex parte* his said claim and obtained the allowance thereof in the sum of approximately \$4,390.00.

X.

That all of said claims and a large number of other claims aggregating upwards of \$4,000,000.00, the exact amount thereof being to your intervener unknown, were filed with the receiver in said cause pursuant to the order of the Court and the notice of the receiver requiring the filing of claims against the Power Company for allowance by the receiver and Court, to the end that the same might be entitled to share in the equitable distribution of the assets of such receivership estate pursuant to law and the principles of equity governing the administration and distribution of assets of insolvent debtors by Courts of Equity in suits brought by one or more creditors in behalf of themselves and all other creditors of the insolvent debtor.

XI.

That on the 23rd day of October, 1915, the said Guy I. Towle filed an answer in this cause, setting up a claim to the personal property which it was alleged was not subject to the lien of said mortgage of the complainant and setting up a claim thereto and lien thereon by virtue of the allowance of his said claim in said Cause No. 509, and by virtue of the appointment of a receiver in said cause; and on said 23rd day of October, 1915, the said L. M. Plumer and E. B. Scull, executors aforesaid, obtained an order *ex parte* giving them leave to intervene in this

cause and to be made parties defendant with the right to file an answer or complaint in intervention, setting up a lien upon and claim to such personal property not subject to plaintiffs' mortgage, basing their said lien and right to intervene upon the appointment of a receiver for said Great Shoshone and Twin Falls Water Power Company and on the approval of their said claim as aforesaid and on the 25th day of October, 1915, the said Jake M. Shank, obtained an order *ex parte* permitting him to intervene in this cause and to file a complaint in intervention upon the same ground and for the same reasons set forth with reference to the intervention of said L. M. Plumer and E. B. Scull; that said cause came on for trial on the 25th day of October, 1915, without the knowledge of your intervener, and the trial thereof was concluded on the 27th day of October, 1915, and the cause submitted on briefs to be filed within seven days thereafter, and within a few days thereafter the Court adjourned until about the first day of December during which time Court was being held in the Central and Northern Divisions for said district; that a decision in said cause was rendered on November 17, 1915, while court was being held either in the Central or Northern Division of said district, and only the parties to the suit were notified thereof; that no further action was taken in said cause until the court again convened in Boise on or about December 6, 1915, when the decree in this cause was made and entered, and immediately thereupon the property embraced in said decree was ad-

vertised for sale by the Special Master to be sold at Twin Falls, Idaho, on January 8, 1916.

XII.

That thereafter and on the 24th day of December, 1915, this Honorable Court made and entered an order in said cause that all persons interested and who desired to contest the validity or the amount due upon any claim filed with the Receiver aforesaid, should on or before the 17th day of January, 1916, file in said cause their objections thereto, and that a hearing thereon should be had on the 14th day of February, 1916, at 2 o'clock P. M.; that no court was held in the Southern Division for the District of Idaho, between the 30th day of December, 1915, and on or about the 10th day of February, 1916, as this intervener is informed and believes and so alleges the fact to be. Your intervener begs leave to refer to the pleadings and files and the minutes of the court in said cause No. 509 and in this cause for a more particular statement of the facts above set forth and for all purposes for which the same may be relevant or pertinent in connection with this intervention and with the same force and effect as if such pleadings, files, minutes and records were herein set forth at large.

XIII.

That on the 14th day of April, 1915, the said Equitable Trust Company of New York as sole Trustee under certain deeds of trust and mortgages given by said Power Company, commenced this action against said Power Company and the said William

T. Wallace as receiver thereof, and the said Guy I. Towle, and Carl J. Hahn as administrator of the estate of Harry M. King, deceased, for the foreclosure of certain deeds of trust and mortgages given by said Power Company and purporting to be first and prior liens upon all the property, rights and assets of said Power Company and on the earnings and income thereof, and which said mortgages and deeds of trust were given to secure the payment of certain first mortgage bonds of said Power Company alleged to be outstanding and unpaid to the amount of \$2,230,000.00, and such proceedings were had in such cause that the same was set for trial on the merits on or about the 26th day of October, 1915, the said Power Company making no defense thereto, but admitted by its answer all the allegations of the Bill of Complaint, as this intervener is informed and believes and so alleges the fact to be.

XIV.

That the said L. M. Plumer and E. B. Scull, executors as aforesaid, and the said Carl J. Hahn, administrator as aforesaid, and the said Guy I. Towle, and Jake M. Shank, without notice to or knowledge thereof by this intervener or any of the other creditors of said Power Company, as your intervener is informed and believes and so alleges the fact to be, having acquired certain information relative to certain property of said Power Company upon which a lien or preference might be acquired superior to the lien of the mortgages or deeds of trust so sought to be foreclosed by said Equitable Trust Company, by

complaint in intervention or answer in this cause alleged and showed that because the said deeds of trust and mortgages had not been executed or filed as required by the laws of the State of Idaho relative to chattel mortgages, the same did not constitute a lien or claim upon the personal property of said Power Company, but that the said interveners and defendants, to-wit: the said Guy I. Towle, Carl J. Hahn, administrator as aforesaid, Jake M. Shank, L. M. Plumer and E. B. Scull, executors as aforesaid, as general creditors of said Power Company had a superior lien or claim upon such personal property and such proceedings were had upon the complaint in intervention and answer so filed that it was adjudged and decreed upon the issues so raised that the mortgages or deeds of trust so sought to be foreclosed by said Equitable Trust Company had not been executed or filed as required by the chattel mortgage statutes of the State of Idaho, and that the lien or claim of said creditors as against certain personal property of said Power Company was prior and superior to the lien of said mortgages and deeds of trust; and it was adjudged and decreed in the decree of foreclosure so entered that the proceeds from the sale of such personal property should be placed by the Special Master appointed for conducting such sale in a fund known and designated in said decree as the "Unsecured Creditors Fund", and that out of such fund said Special Master should pay to the said Guy I. Towle, \$13,963.01, to the said Carl J. Hahn, administrator as aforesaid, \$6,225.15, to the

said L. M. Plumer and E. B. Scull, executors as aforesaid, \$15,625.00, to the said Jake M. Shank, \$4,390.00, with interest at 7% per annum from the date of said decree, to-wit: December 6th, 1915.

XV.

That such personal property has been sold by said Special Master, together with the other property of said Power Company, and the amount realized therefrom was the sum of \$45,000.00 which is the amount to be placed in said "Unsecured Creditors' Fund" to be paid out and distributed as provided in said decree and as above set forth, and the said sum of \$45,000.00 the full amount realized from the sale of the property and assets of said Power Company upon which the said deeds of trust and mortgages so sought to be foreclosed were not decreed a first and prior lien, being the amount realized from the property and assets of the Power Company available for the payment of the claims of other creditors than the said complainant; that in addition to said sum of \$45,000.00 this intervener is informed and believes that there is approximately \$25,000.00 in the hands of the receiver of said Power Company that may also be available for the payment of claims of general creditors, making in the aggregate approximately \$70,000.00 available for the payment of claims aggregating upwards of \$4,000,000.00; that the other property of said Power Company subject to complainant's deeds of trust and mortgages was sold for \$2,000,000.00 by the Special Master under the decree of foreclosure, which amount was

less, as this intervener is informed and believes and so alleges the fact to be, than is due the said plaintiff under said decree of foreclosure.

XVI.

That the general creditors of said Power Company will suffer a large loss as the assets available for the payment of their claims amount to only about two per cent. of the face of said claims; that any payments made to the said Jake M. Shank, Guy I. Towle, Carl J. Hahn, administrator as aforesaid, and L. M. Plumer and E. B. Scull, executors as aforesaid, in excess of their pro rata and proportionate part of the assets available for the claims of general creditors based upon the aggregate amount of the claims of the said general creditors allowed and approved by this Honorable Court will in effect be a payment by the other general creditors to the said Jake M. Shank, Guy I. Towle, Carl J. Hahn, L. M. Plumer and E. B. Scull, and reduce accordingly the amount that can be received by or paid to other general creditors.

XVII.

That the provisions of said decree of Dec. 6th, 1915, giving to the said Guy I. Towle, Jake M. Shank, Carl J. Hahn, L. M. Plumer and E. B. Scull any preference or priority whatsoever over other general creditors of the Power Company or directing the Special Master to make any payments whatsoever to them, are not binding upon this intervener or other general creditors of said Power Company who were not parties to said cause, but said provisions

are as to this intervener and other general creditors void and ineffectual; that to permit such payments to be made as in said decree provided and to permit the said Guy I. Towle, Jake M. Shank, Carl J. Hahn, L. M. Plumer and E. B. Scull to receive more than their proportionate part of the fund available for the payment of general creditors of said Power Company would be unconscionable, unfair and unjust; that the said claimants who were by said decree allowed a preference as aforesaid over other general creditors had invoked the aid and jurisdiction of this Court in said general creditors suit and sought and obtained the benefit of such suit and by their acts and conduct in said cause acquiesced in and consented to the administration of the affairs of said Power Company for the benefit of all creditors and on the plan of the equal and pro rata distribution to all creditors of all the available assets of said Power Company; that the attempt of said Guy I. Towle, Jake M. Shank, Carl J. Hahn, L. M. Plumer and E. B. Scull to obtain an advantage for themselves over other general creditors by intervention in such foreclosure suit is unfair and unjust as to other general creditors, and they should in equity and good conscience be held estopped from claiming any preference as to the fund so obtained in such foreclosure suit for the payment of their claims and designated in said decree as the "Unsecured Creditors' Fund", but such fund should be adjudged and decreed by the Court to be paid over by the Special Master to the Receiver in said general creditors' suit, Equity

Cause No. 509, to be there administered, paid out and distributed equitably and pro rata between all general creditors of said Power Company with such provisions as may be equitable and fair for reimbursing the said Guy I. Towle, Jake M. Shank, Carl J. Hahn, L. M. Plumer and E. B. Scull, for any and all costs, expenses, outlays and attorneys' fees as may have been incurred by them in such intervention and in obtaining such "Unsecured Creditors' Fund" for the benefit of the general creditors of said Power Company, and this intervenor hereby offers to do equity and to pay its proportionate part of all such costs, expenses, outlays and attorneys fees.

XVIII.

That heretofore and early in the year, 1915, this intervenor and National Securities Corporation entered into negotiations with respect to certain property of this intervenor including its said claim against said Great Shoshone and Twin Falls Water Power Company; that in the course thereof a proposition was made by said National Securities Corporation to acquire all said property including said claim; that it was thereupon agreed between said parties that said National Securities Corporation should purchase the same but the purchase price was not agreed upon; that from time to time thereafter said parties endeavored without effect to agree upon such purchase price until some time in January, 1916. That such purchase price has not been paid; that said claim is still the property of this intervenor, and that title thereto has not passed and was not

intended to pass to said National Securities Corporation or at all by virtue of said agreement or in any other manner.

WHEREFORE, this intervener, American Water Works and Electric Company prays:

1. That it be adjudged and decreed that the said Guy I. Towle, Carl J. Hahn, administrator as aforesaid, L. M. Plumer and E. B. Scull, executors as aforesaid, and Jake M. Shank, have not, nor has any one of them, any preference or priority over other general creditors of the Power Company as to money realized from the sale of personal property described in Paragraph II of the decree herein, which money constitutes what was in said decree denominated the "Unsecured Creditors' Fund".

2. That the Special Master be ordered and directed to pay the money placed in said bond, after deducting the expenses and charges to be paid out of the same under the terms of said decree, to William T. Wallace, Receiver of Great Shoshone and Twin Falls Water Power Company in Equity Cause No. 509; the same to be held and distributed by said Receiver under such orders and directions as may be made in said cause.

3. And for such other relief as may be meet and proper under circumstances, and this your intervener will ever pray.

AMERICAN WATER WORKS AND ELECTRIC COMPANY.

By WYMAN & WYMAN, Its Solicitors.
Frank T. Wyman, of Counsel.

State of New York, County of New York, ss.

H. Hobart Porter, being first duly sworn according to law deposes and says; that he is the President of the American Water Works and Electric Company, that he makes this verification on behalf of said intervener, that he has read the foregoing complaint in Intervention and knows the contents thereof, and he believes the matters therein set forth to be true.

.....
Subscribed and sworn to before me this...day of February, 1916.

....., Notary Public.
Residing at.....

And the above and foregoing amended complaint when presented to the court on the 28th day of February, 1916, was unverified and the court stated at the hearing that the amended complaint in intervention might be used in its unverified condition in the presentation of application for leave to intervene, with the understanding that the said amended complaint in intervention should be verified by the proper officers and when so verified, might be lodged as of date the 28th day of February, 1916. This permission to hear the application of the American Water Works and Electric Company on its unverified complaint in intervention was granted to the American Water Works and Electric Company for the reason that petitioners L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, Jake M. Shank, Guy I. Towle, and Carl J. Hahn, as administrator of the estate of Harry M. King, de-

ceased, had noticed for hearing at 10:00 A. M. on the 28th day of February, 1916, their petition for an order upon the Special Master to pay the prior lien claims of these petitioners, and counsel for the American Water Works and Electric Company had asked leave of the court to present the application of the American Water Works and Electric Company on the unverified complaint in intervention in order that the two matters might come before the court on the same morning.

After argument of counsel upon the application for leave to intervent, the petition of the American Water Works and Electric Company for leave to intervene was denied, and on the same day, to-wit, the 28th day of February, 1916, the court rendered its decision, a copy of which is as follows:

(Title of Court and Cause.)

MEMORANDUM DECISION UPON PETITION
OF AMERICAN WATER WORKS AND ELECTRIC
COMPANY TO INTERVENE.

Feb. 28, 1916.

Martin & Cameron, Attorneys for Interveners.

Wyman & Wyman, Attorneys for American Water Works and Electric Company, applicant to intervene.

DIETRICH, DISTRICT JUDGE:

The interveners to whom a prior lien was awarded by the decree present an application for an order requiring the purchaser at the sale to pay into the hands of the Special Master a sufficient additional

amount to cover their claims, and for a further order directing the Master to pay the claims in full.

On the 14th day of February, the American Water Works and Electric Company, through its counsel, Messrs. Wyman & Wyman, presented an application to intervene, for the purpose of resisting payment to the interveners, and after argument the suggestion was made from the bench that without full consideration of the rights of the applicant its petition would be denied in the form in which it was then presented, and further that the application would again be entertained upon a showing touching the diligence of the applicant, and especially touching the ownership of the claim, and the interests, direct and indirect, which parties to the litigation have and have had therein. It seems that no time was fixed for making such showing, but upon notice from the interveners that they would present the application hereinbefore referred to upon this day, it was suggested to counsel for the American Water Works and Electric Company that in order to avoid delay it might present its amended petition to intervene at the time fixed for the interveners' application, and that if the same could not be verified before such time, the verification might be made later and be considered as having been made as of this day. Accordingly the unverified amended petition has been submitted and is entertained, together with the intervenors' application. A decision was announced from the bench at the close of the argument, granting the application of the petitioners and denying

that of the American Water Works and Electric Company, and the views expressed at the former hearing and at the close of the argument today are hereinafter set forth with some amplification, in order that they may be of record.

Admittedly the interveners are entitled to the relief prayed for, unless the American Water Works and Electric Company, hereinafter called the petitioner, is entitled to intervene, and to take from them substantially all of the fruits of their litigation. It did not seek to intervene until the hour set for the confirmation of the sale, at which time but for its appearance it would have been proper to make the order for which the intervenors now pray. In view of the lateness of the application and the impression I had received in the course of the administration of the estate that there was a community of interest, if not a common ownership, as between the holder of all of the bonds and the holder of this claim, it was thought proper to require the petitioner to make a *prima facie* case showing that it was not guilty of laches, and that it had not been cooperating with the plaintiff in the action in resisting the relief granted to the intervenors. While in the decision today I have placed special emphasis upon another consideration, the showing made by the amended petition upon the point suggested is not very satisfactory. The petitioner might be the technical owner of the claim, and yet all of its stock might be held by the owner of the bonds, and hence I before suggested that in explaining the ownership of the claim the owner-

ship of the stock of the petitioner should also be disclosed. It appears from the record in the case that during the entire time of the pendency of the foreclosure suit all the bonds were held by the National Securities Corporation, and it now appears from the amended petition that there was some sort of an arrangement between that company and the petitioner for the purchase of this claim. In view of the record in the receivership and in this case, it is thought to be incumbent upon the petitioner, before it can ask the court to exercise a liberal discretion in its favor, fully and frankly to negative the proposition that it stood with the holders of the bonds in the attempt to defeat the intervenors in procuring the relief, whereas now it seeks to appropriate to itself substantially all that they have succeeded in wresting from the bondholders, at their own expense and peril.

But be that as it may, I have been unable to see any substantial ground on which the right of the petitioner to intervene may be predicated. When the matter was first presented to me upon the 14th of February I had the impression that while it would not be permitted to intervene to share pro rata in the decree, the intervention might be allowed for another purpose. To explain, there is a fund, the precise amount of which has not yet been determined, in the hands of the receiver in the creditors' suit, which presumably will ultimately be distributed to the unsecured creditors, including the intervenors and the petitioner,—and also the plaintiff trustee for such deficiency judgment as may be awarded to it after

applying the proceeds of the sale to the liquidation of its claim. My thought was that by paying the \$45,000.00 to the intervenors the proceeds of the sale would be diminished by that amount, and therefore the deficiency judgment would be correspondingly increased, and the aggregate of the unsecured claims entitled to share in the receivership fund would be equally increased, and thus the petitioner would receive a smaller dividend than would have been distributed to it if the intervenors had stayed out of this suit. It occurred to me that perhaps it could be properly held,—although that seemed extremely doubtful,—that a duty rested especially upon Towle, the plaintiff in that action, and possibly upon other intervenors, not to do anything even in another suit by which they would be benefited to the disadvantage of other creditors. But whether such was or was not their duty, upon reflection it now appears clear to me that the petitioner would not suffer the slightest prejudice even in this respect. Indeed it is practically conceded by counsel that the petitioner's position is precisely the same, and the share it will receive out of the funds in the hands of the receiver is precisely the same, that it would have been had the intervenors never come into the foreclosure suit. The aggregate of the claims to participate in the distribution of that fund will not be increased, because insofar as the deficiency judgment is increased the claims of these interveners will be diminished, so that the aggregate will remain precisely the same. Even if therefore it be assumed that for some reason not

made clear the intervenors owed the petitioner the duty to take no action which would prejudicially affect its distributive share in the receivership fund, it cannot invoke the principle of equitable estoppel here as a ground for intervening, because admittedly it has suffered and will suffer no injury. The intervenors have done nothing against good conscience or to the prejudice of the petitioner in securing and appropriating to their own use the judgment in the foreclosure case. They were under no contractual obligations to the petitioner, and I am unable to perceive how it can be held that they have violated any duty or obligation in seeking payment of their claims out of a fund which in whole would have otherwise gone to the bondholders, and not at all to the unsecured creditors. The judgment is entirely the fruit of their diligence, in the exercise of which they took nothing from the petitioner. The petitioner had the same right as they to come into the suit, of the pendency of which it undoubtedly had knowledge. If it did not join hands with the plaintiff to defeat the intervenors, still, having knowledge of the pendency of the foreclosure suit, and presumably being advised of its legal rights, it chose to remain silent and inactive, thus avoiding the expense and peril of litigation, until after these intervenors have succeeded, and then, when they are about to receive the fruits of their diligence, it seeks to step in and seize the same. It intimates no reason why, though having knowledge that the plaintiff trustee was seeking to appropriate the entire assets of its debtor to the pay-

ment of the bonds, it never lifted a finger in resistance, or suggested that the receiver do so.

The record does not disclose what the real value of the property is upon which the intervenors were awarded a first lien; it may have been very much in excess of the aggregate of their claims. They entered into a stipulation with the plaintiff, agreeing upon a value which was sufficient, but only sufficient, to take care of their claims in full. Had it been known that other creditors would seek to share in such lien it is possible that a much greater value could have been established, but so far as appears the petitioner gave no notice of its intention to assert the present claim until after such stipulation had been entered into. It is further suggested that the receiver might have asserted for all creditors the rights which the court recognized in the intervenors. It is extremely doubtful, to say the least, whether the receiver could have secured a footing to assert such rights, even upon behalf of the intervenors, whose claims had been allowed in the general creditors' suit. But while the petitioner's claim had been presented, it had never been passed upon or allowed, and it may be questioned therefore whether it fell within the principle of law upon which the recognition of the intervenors' liens in the foreclosure suit was predicated. The trustee earnestly contended that before anyone could attack the validity of the chattel mortgage upon the ground relied upon by the intervenors they must show some interest in or lien upon the property; and such undoubtedly is the gen-

eral rule. How could the receiver have shown such interest in or lien upon the property in behalf of the petitioner? However that may be, upon an examination of the receiver's answer and of the proofs it will be seen that they were not sufficient to justify the court in finding or declaring any lien in favor of the petitioner or any other creditors. Proofs of the existence and status of claims were offered only by the intervenors and only touching their claims. The court had no basis upon which to declare a lien in favor of the petitioner.

And thereafter on March 1, 1916, entered the following order, in words and figures as follows:

(Title of Court and Cause.)

In Equity—No. 526.

ORDER DENYING PETITION OF THE AMERICAN WATER WORKS AND ELECTRIC COMPANY FOR LEAVE TO INTERVENE.

On this 28th day of February, 1916, in open Court, Messrs. Wyman & Wyman, solicitors for the American Water Works and Electric Company, offered for filing the petition of the American Water Works and Electric Company for leave to intervene and file its Complaint in Intervention, Messrs. Wyman & Wyman appearing in support of said petition, and Messrs. Martin & Cameron, Karl Paine, J. H. Wise and Alfred A. Fraser respectively appearing for L. M. Plumer and E. B. Scull as executors of the estate of L. L. McClelland, deceased, Guy I. Towle, Carl J. Hahn as administrator of the estate of Harry M. King, deceased, and Jake M. Shank, in opposition

thereto and the same being considered upon the records, files, reports, minutes, stenographers' notes and proceedings in this action, and the premises being fully understood by the Court;

It is ordered, that the petition of the American Water Works and Electric Company for leave to intervene herein and to file herein its complaint in intervention be and the same is hereby denied.

March 1, 1916.

FRANK S. DIETRICH, Judge.

And the Court in reaching its conclusion and decision considered the said petition and amended complaint in intervention and added thereto the following records, files, minutes and proceedings in this cause, which appear elsewhere in this record and are therefore not set out in full below.

1. Bill of Complaint.
2. Supplemental Bill of Complaint.
3. Amendments to Bill of Complaint.
4. Appearance of Receiver.
5. Answer of Receiver.
6. Appearance of Great Shoshone and Twin Falls Power Company.
7. Answer of Great Shoshone and Twin Falls Water Power Company.
8. Answer of Carl J. Hahn, and exhibit.
9. Reply of the Equitable Trust Company of New York to Answer of Carl J. Hahn.
10. Answer of Guy I. Towle.
11. Motion of the Equitable Trust Company of New York to strike Answer of Guy I. Towle.

12. Petition of L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, to intervene.

13. Order allowing L. M. Plumer and E. B. Scull, executors aforesaid, to intervene.

14. Answer of L. M. Plumer and E. B. Scull, executors aforesaid.

15. Motion of the Equitable Trust Company of New York to vacate order allowing L. M. Plumer and E. B. Scull to intervene and to dismiss their petition and answer.

16. Petition of Jake M. Shank to intervene.

17. Order allowing Shank to intervene.

18. Answer of Jake M. Shank.

19. Motion of The Equitable Trust Company of New York to dismiss answer of Jake M. Shank.

20. Statement of Evidence under Equity Rule 75.

21. Stipulation relative to selling property as an entirety.

22. Decree of December 6, 1915.

23. Stipulation relative to value of personalty.

24. Order of Court relative to apportioning proceeds.

25. Notice of confirmation of sale.

26. Motion of confirmation of sale.

And together with the above and foregoing the Court also considered the records, files and proceedings in the cause wherein Guy I. Towle is plaintiff and the Great Shoshone and Twin Falls Water Power Company is defendant being equity cause No. 509 pending in this Court, the material parts of which

are set out or referred to in said complaint and amended complaint in intervention and are in words and figures as follows:

1. Complaint of Guy I. Towle.

(The complaint referred to is identical with the copy thereof set out in this record entitled Complaint of Guy I. Towle, marked "Complainant's Exhibit 3".)

2. Answer of Great Shoshone and Twin Falls Water Power Company.

(The answer referred to is identical with the copy thereof set out in this record entitled Answer of Great Shoshone and Twin Falls Water Power Company, and marked "Complainant's Exhibit 5".)

3. Order of November 2, 1915, appointing William T. Wallace Receiver.

(The order referred to is identical with the copy thereof set out in this record, marked "Complainant's Exhibit 4".)

4. Claim of Carl J. Hahn.

(The claim referred to is identical with Exhibit "C" attached hereto.)

5. Claim of L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased.

(The claim referred to is identical with Exhibit "D" attached hereto.)

6. Cross-bill of Complaint of Plumer and Scull, Executors aforesaid.

(Complaint referred to is identical with Exhibit "D-A" attached hereto.)

7. Claim of American Water Works and Electric Company.

(The claim referred to is identical with Exhibit "E" attached hereto.)

8. Claim of Jake M. Shank.

(The claim referred to is identical with Exhibit "F" attached hereto.)

9. Order allowing claim of L. M. Plumer and E. B. Scull, executors aforesaid.

(The order referred to is identical with Exhibit "G" attached hereto.)

10. Order allowing claim of Jake M. Shank.

(The order referred to is identical with Exhibit "H" attached hereto.)

11. Order allowing claim of Guy I. Towle.

(Order referred to is identical with Exhibit "I" attached hereto.)

12. Order of May 4, 1915, directing Receiver to notify creditors to file claims.

(The order referred to is identical with Exhibit "K" attached hereto.)

13. Order of December 24, 1915, setting time for allowance and contesting of claims.

(The order referred to is identical with Exhibit "L" attached hereto.)

And at the same time the petition for order to Special Master to pay prior lien claims of L. M. Plumer and E. B. Scull, as executors aforesaid, was presented and read to the Court, in words and figures as follows:

(Set out in full on page **224** of this volume and

made a part hereof, and was considered by the Court in the determination of the said motion to pay prior lien claims.

That thereafter and on March 4, 1916, the American Water Works and Electric Company lodged its amended complaint in intervention with the clerk, in all respects identical with the complaint in intervention, considered by the Court on February 28th, 1916, on the application of the American Water Works and Electric Company to intervene, excepting that paragraph 18 thereof was as follows:

“XVIII.

“That heretofore and early in the year 1915, this intervener offered to sell certain property of this intervener to National Securities Corporation, including its said claim against Great Shoshone and Twin Falls Water Power Company, for a consideration thereafter to be determined, which offer was accepted by said National Securities Corporation. That thereafter efforts were made from time to time to determine the consideration so to be paid, but no such determination was reached until January 17, 1916, at which time such consideration was determined and agreed upon. That such consideration has not yet been paid. That this intervener has made no assignment of said claim, but it has retained, and still retains, title to said claim and will continue to retain title thereto until the consideration so determined has been paid in full. That said National Securities Corporation has no authority or control, through stock ownership or otherwise, over this intervener.”

And the said amended complaint, as so lodged, had at the end thereof the following verification :

“State of New York,

“County of New York,—ss.

“H. HOBART PORTER, being first duly sworn according to law, deposes and says: That he is the President of the American Water Works and Electric Company; that he makes this verification on behalf of said intervener; that he has read the foregoing complaint in intervention and knows the contents thereof, and he believes the matters therein set forth to be true.

“H. HOBART PORTER.

“Subscribed and sworn to before me this 29th day of February, 1916.

“A. G. SWAN,

“Notary Public, residing at Kings County.

Certificate filed in New York County,
No. 216, Register No. 8390.”

(Seal)

ORDER SETTLING STATEMENT.

The within and foregoing is settled and allowed this 21st day of April, 1916, as the statement on the appeal of the American Water Works and Electric Company taken from those certain orders made and entered herein on the 14th day of February and the 1st day of March, 1916, denying the petition of said American Water Works and Electric Company to intervene in this cause, and order made on the 1st day of March, 1916, in this cause, and contains all of the papers and records considered by the Court in deny-

ing the said petition of the American Water Works and Electric Company, aforesaid, for leave to intervene and file its complaint in intervention of this cause.

April 21, 1916.

FRANK S. DIETRICH,
District Judge.

Filed April 21, 1916.

W. D. McReynolds, Clerk.

EXHIBIT "C".

(Title of Court and Cause.)

No. 509—In Equity.

STATEMENT OF CARL J. HAHN, ADMINISTRATOR OF THE ESTATE OF HARRY M. KING, DECEASED, FOR PRIORITY AND AS AN OPERATING EXPENSE.

Carl J. Hahn, administrator of the estate of Harry M. King, deceased, showing to the court that on the 6th day of May, 1913, Harry M. King, was an employee of said Great Shoshone and Twin Falls Water Power Company, to do and perform such work for said corporation as might be required of him, upon the pole line of said defendant in constructing and repairing of said pole line, under an uninsulated high tension power wire, charged with a dangerous and deadly current of electricity; that while said deceased, Harry M. King, was in the employ of the Great Shoshone and Twin Falls Water Power Company, and while said corporation was in the operation of and operating said plant, and while the said

deceased was in the performance of his duties for said corporation, in the operation and construction of said plant, the said corporation negligently and carelessly failed to ground the wire upon which said deceased was then working, and negligently and carelessly permitted the wire upon which the deceased was working to become fastened under a small bush or tree and to become loosened from said bush or tree and to flip up against the uninsulated light, heat and power wires of said defendant, which was charged and loaded with a dangerous and deadly current of electricity and to charge and load the wire upon which the deceased was working and holding down, by which the said Harry M. King, deceased, was severely shocked, burned and bruised, and from which the said Harry M. King died on the 6th day of May, 1913, and left surviving him his widow, Katherine King, and his minor children, Margaret King, age eight years, and Alice King, age six years, and left no other child nor descendants of deceased child.

This claimant further shows to the court that on the 29th day of October, 1913, he filed a suit in the District Court of the Fourth Judicial District of the District of Idaho, in and for the County of Twin Falls against the said Great Shoshone and Twin Falls Water Power Company for damages in the sum of \$46,-480.50 for negligence and carelessness of said Great Shoshone and Twin Falls Water Power Company, which resulted in the death of Harry M. King, deceased, as aforesaid, which Great Shoshone and Twin Falls Water Power Company caused said action to be

removed to the District Court of the United States of the District of Idaho, Southern Division, where issue was joined in said court and on the 23rd day of September, 1914, said cause was duly tried in said District Court of the United States by a jury and a verdict returned thereafter in the sum of \$5590.00, together with costs and disbursements in the sum of \$174.35; a copy of which judgment is hereto attached and marked "Exhibit A" and made a part of this claim.

This claimant further shows to the court that the aforesaid judgment is a liability contracted and incurred in the operation, use and enjoyment of the franchise of said corporation, and in the use and privilege of said franchise, and is a running and operating expense of said corporation, and its franchise, and should be allowed as a priority over other claims not contracted in the general operation and running expense of said corporation.

This claimant further shows to the court that he is the duly appointed, qualified and acting administrator of the estate of Harry M. King, deceased, and was, and is now, at all times hereinbefore mentioned.

Wherefore, this claimant prays that said claim be paid and allowed as an operating expense, and that the same have priority over other claims that are not found to be contracted in the operation of said company.

JAMES H. WISE,
Attorney for Claimant.
Residence and Office, Twin Falls, Idaho.

State of Idaho,
County of Twin Falls,—ss.

Carl J. Hahn, being first duly sworn upon his oath, states: That he is administrator of the estate of Harry M. King, deceased. That he had read the foregoing statement thereto and knows the contents therein, and believes the same to be true.

CARL J. HAHN.

Subscribed and sworn to before me this the 17th day of May, 1915.

JAMES H. WISE,

(Seal)

Notary Public.

“EXHIBIT A.”

In the District Court of the United States, District of Idaho, Southern Division.

CARL J. HAHN, administrator of the estate of
Harry M. King, deceased, Plaintiff,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation,

Defendant.

JUDGMENT ON VERDICT OF JURY IN OPEN COURT.

This action came on regularly for trial, on this the 22nd day of September, 1914, the plaintiff appearing in person and by his attorney, James H. Wise, of Twin Falls, Idaho, the defendant appearing by its attorneys, Samuel B. Hays and Pasco B. Carter. A jury of twelve persons was regularly empaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence, the argu-

ments of counsel and instructions of the court, the jury retired to consider of their verdict and subsequently returned into court with the verdict duly signed, finding for the plaintiff in the sum of Five Thousand Five Hundred Ninety Dollars.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, considered and adjudged that said plaintiff do have and recover from said defendant the sum of Five Thousand Five Hundred and Ninety Dollars, together with costs and disbursements in this action, taxed in the sum of One Hundred Seventy-four and 35/100 Dollars.

Filed September 23, 1914.

A. L. Richardson, Clerk.

Endorsed: Filed June 21, 1915.

A. L. Richardson, Clerk.

“EXHIBIT D.”

(Title of Court and Cause.)

No. 509—In Equity.

PETITION TO INTERVENE.

To the Honorable Judge of the District Court of the United States for the District of Idaho, Southern Division.

The petition of L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, citizens of and residing in Alleghaney County, in the State of Pennsylvania, humbly complaining of Guy I. Towle, plaintiff, and the Great Shoshone and Twin Falls Water Power Company, a corporation, defendant in the above entitled cause, would show unto your

Honor that Guy I. Towle, plaintiff, did on the 2nd day of November, 1914, file his bill in this cause, wherein he alleges that he is the owner and holder of a certain demand promissory note dated May 26th, 1913, in the amount of \$12,857.29; that the payment of said note had been duly demanded and that there was due and owing thereon to the plaintiff the sum of \$12,857.29, with interest at the rate of 6% per annum from May 26th, 1913; that the plaintiff brought his bill on his own behalf and on behalf of all creditors of the Great Shoshone and Twin Falls Water Power Company and prayed the court for the appointment of a receiver of the defendant to take charge of and preserve the property of the defendant for the protection of the rights of the plaintiff and of all other parties in interest, as more fully appears in the bill of complaint on file in this action; that on the 2nd day of November, A. D. 1914, the defendant, Great Shoshone and Twin Falls Water Power Company, filed its answer admitting the allegations contained in the Bill of Complaint and joining with the plaintiff in its prayer for the appointment of a receiver.

That the petitioners claim an interest in the property of the defendant corporation on the ground that the said defendant, on the 2nd day of July, 1914, for value received, executed and delivered to the said L. L. McClelland, deceased, its promissory note in the sum of \$20,000, bearing date July 2nd, 1914, payable in five years from date thereof, without interest, at any bank in New York City; that the said

note has not been paid, nor any part thereof; that under the order of this court, made May 6th, 1915, the interveners herein are required to intervene in this cause and to present their claims for approval; that the interveners herein filed their claim with said receiver on or before the 10th day of August, 1915, as provided for in said order, and also filed with this court its claim and petition for intervention within said time.

Wherefore, Interveners pray for permission to file their petition in intervention in accordance with the order of your Honorable Court, made in this cause on the 6th day of May, 1915, and to participate in the distribution of the assets of the receivership estate.

And they will ever pray, etc.

MARTIN & CAMERON,
Attorneys for Interveners,
Residing at Boise, Idaho.

Endorsed: Filed August 11, 1915.

A. L. Richardson, Clerk.

By Pearl E. Zanger, Deputy.

“EXHIBIT D-a.”

(Title of Court and Cause.)

Equity No. 509.

CROSS BILL OF COMPLAINT.

To the Honorable the Judges of said Court:

Your orators, L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, complain and say:

FIRST: That your orators are the duly appointed and qualified executors of the estate of L. L. McClelland, deceased, and that Letters Testamentary upon said estate were duly issued unto them, as Executors, by the Register of Wills of Allegheny County, Pennsylvania, on the 26th day of December, A. D. 1914.

SECOND: That the Great Shoshone and Twin Falls Water Power Company, the defendant above named, on the second day of July, A. D. 1914, for value received, executed and delivered unto the said L. L. McClelland its promissory note in the sum of Twenty Thousand (\$20,000.00) Dollars, bearing date of July 2, 1914, payable in five years from date thereof, without interest, at any bank in New York City, a true copy of which note is hereto attached, marked Exhibit "A", and made a part hereof.

THIRD: That the Great Shoshone and Twin Falls Water Power Company under the terms of said note is indebted unto your orators as executors of the estate of L. L. McClelland in the sum of Twenty Thousand (\$20,000.00) Dollars, payable July 2nd, 1919.

FOURTH: That your orators, as said executors, are entitled to participate in the distribution of the assets of the Great Shoshone and Twin Falls Water Power Company and to receive the proportionate share thereof to which the then present value of said note may entitle them.

Your orators therefore, in accordance with the order of your Honorable Court made in this cause on

the 5th day of May, A. D. 1915, herewith present their claim, as said executors, and pray that they may be permitted to intervene in the above entitled cause and to participate in the distribution of the assets of the receivership estate.

And they will ever pray, etc.

ED. B. SCULL,

L. M. PLUMER,

Executors of the Estate of L. L. McClelland.

MARTIN & CAMERON,

Attorneys for Cross-Complainants.

Boise, Idaho.

State of Pennsylvania,

County of Allegheny,—ss.

Before me, the undersigned authority, personally appeared L. M. Plumer, who being duly sworn according to law, deposes and says that he has knowledge of the facts set forth in the foregoing Cross Bill of Complaint and that the facts set forth therein are true and correct as he verily believes.

L. M. PLUMER.

Sworn to and subscribed before me this 31st day of July, 1915.

KATHERINE K. GEORGE,

(Seal)

Notary Public.

My commission expires January 16th, 1919.

EXHIBIT "A".

New York, N. Y., July 2, 1914.

\$20,000.00

.....Five years....after date, the Great Shoshone and Twin Falls Water Power Company promise to pay to the order of L. L. McClelland, Twenty

Thousand and no/100 Dollars, at any bank in New York City, without interest.

VALUE RECEIVED.

GREAT SHOSHONE & TWIN FALLS WATER
POWER CO. (Signed) J. H. PURDY,
Vice-President.

No..... Due.....

Filed August 10, 1915.

"EXHIBIT E."

(Title of Court and Cause.)

Equity No. 509.

State of New York,
County of New York,
City of New York,—ss.

On this 30th day of July, 1915, before me, the undersigned, personally appeared Sturt H. Patterson, personally known to me, who being by me duly sworn, deposes and says:

That he is the Vice-President and Treasurer of The American Water Works & Electric Company, Incorporated, hereinafter called the claimant, and its duly authorized agent in the making of this affidavit, and that The Great Shoshone & Twin Falls Water Power Company, the defendant in the above entitled cause, is justly indebted unto the claimant on account of the matters and things hereinafter mentioned and in the amounts hereinafter set forth, with interest thereon, to-wit:

First. On open book account of the defendant company unto the American Water Works & Guarantee

Company in the sum of Five Hundred Fifty-one Thousand Seven Hundred Seventy-six Dollars Sixty-two Cents (\$551,776.62) with interest thereon from July 7th, 1913, duly assigned and transferred for a valuable consideration unto the claimant herein.

Said book account is exceedingly voluminous as its various items are on account of numerous charges made against the defendant company by said Guarantee Company on account of the construction and equipment of the power projects and transmission lines and systems of the defendant company by said Guarantee Company extending over a period of about six (6) years, and of charges made for advances by said Guarantee Company, to said defendant company for the purposes aforesaid and in the financing of the defendant company, all of which the defendant company promised to pay unto said Guarantee Company but which it has failed to do; that a complete transcript thereof would fill many dozens of pages of closely typewritten matter and your affiant is informed that the furnishing of such transcript would on that account be unnecessary and unnecessary for the further reason that the books of the defendant company show it to be indebted unto said Guarantee Company on account of the matters in this paragraph mentioned in the amount hereinbefore given.

Second. That the defendant company is further indebted unto the claimant herein on account of expenditures made by the receivers of the American Water Works and Guarantee Company under orders of the court of their appointment authorizing the

making of the same and which were made at the special instance and request of the defendant company, and which the defendant company promised to repay but has failed so to do, with interest on said expenditures and advances at six per cent (6%) per annum from the dates next hereinafter mentioned, at which time such expenditures and advances were made and an itemization of which is as follows:

July 22, 1913.....	\$ 19.02
Sept. 19, 1913.....	2,500.00
Oct. 24, 1913.....	2,500.00

That the said claims have been duly assigned to the claimant herein for a valuable consideration and are justly owing unto it by the said defendant company.

Third. That defendant company is further indebted unto the claimant herein on account of a certain promissory note of the defendant company, dated June 15, 1913, in the sum of Thirty-eight Thousand Two Hundred Forty-one (\$38,241.00) Dollars bearing interest at six per cent (6%) per annum, less a credit entered on this note July 2, 1914, in the sum of Twenty Thousand (\$20,000) Dollars. The said note was payable to the order of said Guarantee Company, duly endorsed for transfer, and was acquired by claimant for valuable consideration and is now held by claimant.

Fourth. That the defendant company is further indebted unto the claimant herein in the sum of Sixty-seven Thousand Five Hundred Ninety Dollars and Fifty-eight Cents (\$67,590.58) with interest

thereon from the 7th day of July, 1913, on account of the following matters and things:

That in July, 1913, the American Water Works & Guarantee Company in the suit of Frank G. Glover et al. vs. said company in the District Court of the United States for the Western District of Pennsylvania, was placed in the hands of receivers under an order of said court and at that time that company had on deposit with various banks the sum of Sixty-seven Thousand Five Hundred Ninety Dollars and Fifty-eight Cents (\$67,590.58) and said banks held the unsecured promissory notes of the defendant company (all maturing within six (6) months from July 7, 1913) payable to the order of said American Water Works & Guarantee Company to the aggregate amount of Three Hundred Thirty-three Thousand Six Hundred Forty-three Dollars Seventy-one Cents (\$333,643.71) in their principal sums, the same having for a valuable consideration been delivered to said Guarantee Company and by it endorsed and discounted with said banks.

That the aforesaid sum of money belonging to said Guarantee Company was on July 7, 1913, impounded by the banks holding said funds on deposit and was by said banks applied to payment *pro tanto* of the sums owing to said banks holding such notes.

That the amounts for which claim is hereinbefore made were acquired by claimant at a public sale of all of the property and assets of said American Water Works & Guarantee Company as an entirety in the above entitled cause against said company in the

United States District Court for the Western District of Pennsylvania under a decree of sale made on April 16, 1914, which decree of sale was made absolute by an order entered in said suit on the 28th day of April, 1914, and pursuant to which a deed was executed and delivered under date of May 1, 1914, unto claimant for all of the property and assets of said Guarantee Company.

That in and by said deed there was thus transferred to the claimant herein all of the claims of the said Guarantee Company hereinbefore referred to and of its receivers against the defendant herein, and on account of the purchase by the claimant of said property and assets of said Guarantee Company and the deed conveying the same, the claimant herein is entitled not only to reimbursement for the amount referred to in this paragraph but to payment by the defendant of the other items hereinbefore claimed with interest thereon as stated.

Fifth. That the defendant Company is further indebted unto the claimant herein in the sum of One Hundred Five Thousand Seven Hundred Three Dollars and Ninety Cents (\$105,703.90) with interest thereon at six per cent (6%) per annum from April 30, 1914, advanced to the defendant company at its special instance and request by the Stockholders Protective Committee of said Guarantee Company and which the defendant company promised to repay but has failed so to do.

That the above mentioned claim of said Stockholders Protective Committee was duly assigned unto the

claimant herein and the amounts now represented by this claim are justly due and owing unto the claimant herein.

Sixth. That the said defendant company is further indebted unto the claimant herein in the sum of Eleven Thousand Eight Hundred Eighty-eight Dollars and Thirty-seven Cents (\$11,888.37), less rebates allowed amounting to Six Hundred Eighty-one Dollars and Fifty-eight Cents (\$681.58) and protest fees amounting to Eleven Dollars and Forty-six Cents (\$11.46), a total of Eleven Thousand Two Hundred Eighteen Dollars and Twenty-five Cents (\$11,218.25) being in payment of interest as adjusted as of April 30, 1914, with the banks then holding the promissory notes of the defendant company hereinbefore mentioned and which payment was advanced by claimant unto defendant company at the special instance and request of the defendant company and which the defendant company promised to repay but has failed so to do, and which amount of Eleven Thousand Two Hundred Eighteen Dollars and Twenty-five Cents (\$11,218.25) with interest thereon from the eleventh day of August, 1914, at six per cent (6%) per annum, is still due and owing unto the claimant.

Seventh. That the defendant is further indebted unto the claimant herein in the sum of Three Hundred Twenty-two Thousand Three Hundred Dollars (\$322,300) on account of the following matters and things:

That three of the promissory notes of the defendant company referred to in paragraph Fourth hereof were in July, 1913, substituted with three new notes of the defendant company for like amounts with accrued interest to the date of substitution and these new notes so issued in substitution were issued and dated on the following dates and for the following amounts:

July 25, 1913.....	\$30,251.78
July 28, 1913.....	34,693.91
July 29, 1913.....	36,725.69

All of these notes so issued in substitution were made payable to the order of said Guarantee Company and were by it endorsed for transfer pursuant to an order of said United States District Court for the Western District of Pennsylvania in the above entitled cause against said company and were delivered to the bank holding the notes for which the new notes were issued in substitution.

That between the 15th day of May, 1914, and the 31st day of August, 1914, said new notes so issued in substitution and the then remaining notes referred to in paragraph Fourth thereof, were substituted with new notes of the defendant company to the aggregate amount of Two Hundred Sixty-seven Thousand Five Hundred One Dollars and Ninety-three Cents (\$267,501.93) and at the request of the defendant company and deposited as collateral security for the payment of the principal and interest of the said new notes so issued in substitution, the sum of Three Hundred Twenty-two Thousand Three Hun-

dred Dollars (\$322,300) at par of its collateral trust 20-year five per cent Gold Bonds of the claimant, dated April 1, 1914, and issued under and secured by its Deed of Trust unto the Bankers Trust Company of the City of New York, which bonds under the terms of such new notes so issued in substitution may be sold by the holders of said notes upon non-payment of the principal thereof, any of which notes may be made due and payable by the respective holders thereof upon non-payment at any semi-annual date, August 1st or February 1st of each year, in event of default in payment of interest then maturing. The aforesaid notes so given by the defendant in substitution are all dated as of the first of February, 1914, and are by their terms due and payable on or before two years from that date.

That owing to the insolvency of the defendant company and the pending foreclosure of its mortgage, dated May 1, 1910, unto the North American Trust Company and James D. O'Neil, Trustees, the present trustees thereunder being The Equitable Trust Company of New York and F. R. Babock, securing bonds outstanding thereunder to the aggregate amount of Two Million Three Hundred Forty Thousand Dollars (\$2,340,000) in their principal sums, the par value of the above bonds will be lost to the claimant herein as the defendant company will be utterly unable to make payment either of principal or interest upon said notes and which said bonds will be sold to enforce the security of said notes, and on that account the defendant company is justly indebted unto the claim-

ant for the par value of said bonds of the claimant amounting to Three Hundred Twenty-two Thousand Three Hundred Dollars (\$322,300), together with interest accruing thereon from April 1, 1915, to which date interest on said bonds has been paid.

Eighth. That defendant company is further indebted unto the claimant herein in the following amounts with interest thereon from the following dates:

October 5, 1914.....	\$4,093.71
January 31, 1915.....	8,025.03
July 30, 1915.....	8,025.03

These amounts are due on account of interest payments made by the claimant upon the above mentioned notes of the defendant company referred to in paragraph Seventh hereof, and which the claimant has found it necessary to pay on account of its having deposited its bonds as collateral security for the payment of said notes. Interest is due unto claimant upon the above mentioned amounts from the date of said respective payments at the rate of six per cent (6%) per annum.

Ninth. The defendant company is further indebted unto the claimant herein in the amounts next hereinafter set forth with interest thereon from the respective dates of the assignments hereinafter mentioned, at six per cent (6%) per annum, on account of the assignment to the claimant herein of open book accounts of the following named companies against said defendant company:

Southern Idaho Telephone Company, Limited,

334 *The Equitable Trust Company, etc., vs.*

Amount of account assigned.....\$ 117.38

Assignment dated October 22, 1914.

Twin Falls North Side Land & Water Company,

Amount of account assigned..... 114,024.19

Assignment dated July 3, 1914.

Twin Falls Salmon River Land & Water Company,

Amount of account assigned..... 5,529.95

Assignment dated June 4, 1914.

Twin Falls North Side Investment Co., Limited,

Amount of account assigned..... 29,029.27

Assignment dated October 2, 1914.

North Side Canal Company, Limited,

Amount of account assigned..... 32.59

Assignment dated September 2, 1914.

The aforesaid accounts were acquired by claimant for a valuable consideration and are justly due and owing unto it.

Tenth. The defendant company is further indebted unto the claimant herein in the sum of Eleven Thousand Seven Hundred Twenty-five Dollars and Fifty-two Cents (\$11,725.52) with interest thereon at six per cent (6%) per annum from June 8th, 1914, on account of the following matters and things:

On the date last mentioned the defendant company executed and delivered its four certain promissory notes dated June 8, 1914, each for the sum of Two Thousand Nine Hundred Thirty-one Dollars and Thirty-eight Cents (\$2,931.38) each to the order of Slick Brothers Construction Company, Limited, all of which have been acquired by the claimant herein for a valuable consideration and are now held by it,

each of which notes is of like tenor and date and is duly endorsed for transfer.

Eleventh. That defendant company is further indebted unto the claimant herein on items of open book account in the sum of Twenty-five Thousand Five Hundred Thirteen Dollars and Four Cents (\$25,513.04) appearing on statement of account hereto attached and marked "Exhibit A" and which items are not included in any of the items upon which proof of claim has hereinbefore been made after allowing credits on such sum last named to the amount of Nineteen Thousand Six Hundred Thirty Dollars and Forty-two Cents (\$19,630.42), leaving a net balance on account of the matters in this paragraph referred to of Five Thousand Nine Hundred Eighty-two Dollars and Sixty-two Cents (\$5,982.62). This statement of account includes all items upon which proof has hereinbefore been specifically made except those set forth in paragraphs Third, Seventh and Tenth hereof.

Affiant further states that the amounts for which claim is hereby made are justly due and owing unto the claimant by defendant company and that there are no set-offs or counter-claims against any of the same other than hereinbefore specifically set forth and other than as set forth in said Exhibit A.

STEWART H. PATTERSON.

Sworn and subscribed to before me this 30th day of July, 1915.

A. G. SWAN,
Notary Public.

*EXHIBIT A.*GREAT SHOSHONE & TWIN FALLS WATER
POWER CO. JULY 30, 1915.

In account with
AMERICAN WATER WORKS & ELECTRIC CO.
Inc.

1913

July 7—Balance Open Account to A. W.

W. & G. Co.	\$551,776.62
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Sept. 30—Advances by Receivers of A.

W. W. & G. Co.	2,500.00
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Oct. 31—Advances by Receivers of A. W.

W. & G. Co.	2,500.00
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1914

Apr. 30—Advances by Receivers of A.

W. W. & G. Co.	19.02
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Apr. 30—Cash advanced to Common-

wealth Trust Co.	105,703.90
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Apr. 30—Cash of A. W. W. & G. Co. im-

pounded and applied on notes of Gt. Sho. & T. F. W. P. Co. by banks.....	67,590.58
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Apr. 30—Interest and protest fees on

bank loans to 5/1/14	11,218.25
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June 4—Book account of T. Falls, Sal-

mon River L. & W. Co. against Gt. Sho. & T. F. W. P. Co. assigned	5,529.95
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June 5—W. L. Clark Co., Insurance....	324.85
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Ed Ball Agency Premium on Fulton Bond	10.00
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Westinghouse Elec. & Mfg. Co., Inter- est on Note	86.25
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June 26—Westinghouse Elec. & Mfg. Co., Interest on Notes	84.33
July 23—Book account of T. Falls No. Side L. & W. Co. against Gt. Sho. & T. F. W. P. Co. assigned	114,024.19
Aug. 18—Evening Post Printing Office, Printing	115.25
Aug. 18—Evening Post Printing Office, Printing	28.00
Sept. 2—Book account of the North Side Canal Co., Ltd., against Gt. Sho. & T. F. W. P. Co. assigned	32.59
Sept. 29—Westinghouse Elec. & Mfg. Co., Interest on Notes	191.34
Oct. 2—Book account T. Falls No. Side Investment Co., Ltd., against Gt. Sho. & T. F. W. P. Co. assigned	29,029.27
Oct. 5—Interest on Bank Loans to 8/1, 1914	4,093.71
Oct. 22—Book account Sou. Idaho Telephone Co., Ltd., against Gt. Sho. & T. F. W. P. Co. assigned.....	117.38
Oct. 28—Delaware Trust Co., Stock Transfer Book	2.00
Oct. 5—Westinghouse Elec. & Mfg. Co., Interest on Notes	64.62
Oct. 5—Chubb & Son, Insurance.....	.20
Oct. 5—Kirkland & Yardly, Insurance.	106.50
Oct. 31—Amounts paid out under contracts of Gt. Sho. & T. F. W. P. Co.,	

338 *The Equitable Trust Company, etc., vs.*

dated July 29 and 31, 1914, guaranteed by A. W. W. & E. Co., Inc.	24,497.50
Nov. 16—Chubb & Son, Insurance10
Dec. 23—Filing Annual Report	2.00
1915	
Jan. 31—Interest on Bank Loans to Feb. 2, 1915	8,025.03
Feb. 16—Chubb & Son, Insurance10
July 30—Interest on Bank Loans to Aug. 1, 1915	8,025.03
Less following credits:	
1914	
Apr. 30—On account assignment claim against Twin Falls Oakland Land & Water Company	5,056.28
July 22—On account assignment claim against Idaho Southern Railroad Co..	14,571.59
Sept. 3—Received from R. L. Kester on account	2.55
Endorsed: Filed August 9, 1915.	

A. L. Richardson, Clerk.

By Pearl E. Zanger, Deputy.

EXHIBIT F.

Equity Cause No. 509.

To W. T. Wallace, Receiver of the Great Shoshone and Twin Falls Water Power Company:

The undersigned, Jake M. Shank, hereby presents his claim against the Great Shoshone and Twin Falls Water Power Company with a statement regarding same:

Great Shoshone and Twin Falls Water Power Company, debtor to Jake M. Shank, creditor, amount due on account of contract of settlement of claim for damages dated March 11, 1914.

Principal\$4000.00

Interest 390.00

Total\$4390.00

The above claim grows out of a contract dated March 11, 1914, whereby the Great Shoshone and Twin Falls Water Power Company agreed to pay claimant the sum of \$8,000.00 in full settlement of a suit and claim for damages against the said company then pending. The company has heretofore paid on the principal the sum of \$4,000.00, leaving the balance due as stated above.

JAKE M. SHANK,
Claimant.

State of Idaho,
County of Twin Falls,—ss.

Jake M. Shank, of Twin Falls, Idaho, being first duly sworn on oath deposes and says: That he has read the above and foregoing claim and knows the contents thereof; that the items therein set forth are true and correct, and the amount thereof, to-wit, \$4,390.00, is now due and payable to claimant.

JAKE M. SHANK.

Subscribed and sworn to before me this 13th day of August, 1915.

W. P. GUTHURE,
Notary Public.

Lodged August 14, 1915.

EXHIBIT G.

(Title of Court and Cause.)

Equity No. 509.

ORDER ALLOWING CLAIM OF EXECUTORS
OF ESTATE OF L. L. McCLELLAND, DE-
CEASED.

The duly verified claim of L. M. Plumer and E. B. Scull, Executors of the estate of L. L. McClelland, deceased, duly filed herein on the 10th day of August, 1915, pursuant to the order of this court, made in this cause on the 5th day of May, 1915, coming on for hearing for allowance or rejection this 16th day of October, 1915, in chambers, S. H. Hays, Esquire, appearing for the receiver, William T. Wallace, and Messrs. Martin & Cameron appearing for the above named claimant, and upon the statement of the said receiver, William T. Wallace, that the above named claim appears upon the books of the Great Shoshone & Twin Falls Water Power Company as a valid and existing claim against said company and it further appearing that the said receiver knows no reason why said claim should not be approved and allowed, it is

ORDERED, ADJUDGED AND DECREED that the claim of L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, duly filed herein on the 10th day of August, 1915, is hereby allowed and approved for and in the sum of Fifteen Thousand Six Hundred Twenty-five and no/100ths Dollars.

October 16, 1915.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed October 16, 1915.

A. L. Richardson, Clerk.

By Pearl E. Zanger, Deputy.

EXHIBIT "H".

(Title of Court and Cause.)

Equity No. 509.

ORDER ALLOWING CLAIM.

The claim of the said Jake M. Shank having been heretofore filed, pursuant to an order of this court, coming on for hearing for allowance or rejection thisday of October, 1915, in chambers, S. H. Hays, Esquire, appearing for the Receiver, William T. Wallace, and Alfred A. Fraser, Esquire, appearing for the above-named claimant; and upon the statement of the said receiver, William T. Wallace, that the above-named claim appears upon the books of the Great Shoshone & Twin Falls Water Power Company as a valid and existing claim against said company, and it further appearing that the said receiver knows of no reason why said claim should not be approved or allowed,

It is hereby ORDERED, ADJUDGED AND DECREED that the claim of said Jake M. Shank is hereby allowed and approved in the sum of Four Thousand Three Hundred Ninety Dollars.

Dated this 25th day of October, 1915.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed October 25, 1915.

W. D. McReynolds, Clerk.

EXHIBIT "I".

(Title of Court and Cause.)

In Equity—No. 509.

ORDER ALLOWING CLAIM OF GUY I. TOWLE.

The above named Guy I. Towle, complainant herein, having heretofore on the 2nd day of November, 1914, duly filed herein a duly verified complaint setting forth among other things that the above named defendant company was on said date truly and justly indebted to him on said date in the sum of \$12,857.-29 with interest thereon at the rate of six per cent per annum from the 26th day of May, 1913, upon a demand promissory note for said principal sum made and delivered on said date to the American Waterworks & Guarantee Company, a New Jersey corporation, by the above named defendant, of which said note the said Guy I. Towle was on the 2nd day of November, 1914, and still is the owner and holder, and the above named defendant having, by its answer to the said complaint of the said Guy I. Towle, which answer was also filed herein on the 2nd day of November, 1914, admitted the allegations of indebtedness to Guy I. Towle, and this matter coming on for hearing on this day of October, 1915, in chambers for allowance or rejection of said claim

of indebtedness, S. H. Hays appearing for the Receiver herein, William T. Wallace, and Karl Painé appearing for the plaintiff and claimant, Guy I. Towle, and upon the statement of the receiver that the above named claim appears upon the books of the Great Shoshone & Twin Falls Water Power Company as a valid and existing claim against said company and it further appearing that said Receiver knows no reason why said claim should not be approved and allowed, it is

Ordered, adjudged and decreed that the claim of Guy I. Towle as set forth in the verified complaint of said Guy I. Towle duly filed herein on the 2nd day of November, 1914, be, and the same hereby is, allowed and approved for and in the sum of \$13,963.01.

Dated October 23, 1915.

FRANK S. DIETRICH, Judge.

Filed Oct. 23, 1915.

W. D. McReynolds, Clerk.

EXHIBIT "K".

(Title of Court and Cause.)

In Equity—No. 509.

ORDER DIRECTING CREDITORS TO PRESENT CLAIMS, AND NOTICE TO BE GIVEN.

The petition of William T. Wallace, Receiver herein, for an order requiring all persons having claims against the defendant company and the receivership estate to present their claims, having been duly presented and considered, and it appearing that claims

against the defendant company and the receivership estate should be presented for allowance or approval to the Receiver, and that any claims for preferential payments should likewise be presented;

IT IS ORDERED That all creditors having claims for preference under the order heretofore made by the Court herein relating to the payment of operating and other similar expenses within six months prior to the appointment of the Receiver be required to present their said claims to the said William T. Wallace, Receiver of the defendant corporation, for allowance within *Ninety* days from this date, and other creditors having claims against the assets of said receivership estate be required to intervene in this cause within a like time and present their claims for approval;

That said Receiver mail to each creditor known to him a notice of the substance of this order substantially in the following form:

To all Creditors of the Great Shoshone and Twin Falls Water Power Company:

Notice is hereby given pursuant to an order of the District Court of the United States for the District of Idaho, Southern Division, in a cause therein pending wherein Guy I. Towle is Plaintiff and the Great Shoshone and Twin Falls Water Power Company is defendant, being Case No. 509; that all creditors having claims or preference not heretofore allowed on account of claims arising from the operations of said company prior to the 2nd day of November, 1914, the date

of the appointment of the Receiver in said cause, which were proper to be paid as expenses of operation and maintenance at any time within six months prior to the appointment of said Receiver, are directed to file their claims with said Receiver on or before the 10th day of August, 1915, and all other creditors are directed to present their claims and intervene in said cause on or before said date, and all claims not presented for filing with the Receiver or presented by intervention within said time shall be barred from any participation in the assets of the Receivership estate.

Dated May, 1915.

By order of the Court.

By WILLIAM T. WALLACE,
Receiver.

That a like notice be published once a week for four (4) successive weeks in the Idaho Daily Statesman and in the Evening Capital News, newspapers published in the City of Boise, County of Ada, State of Idaho, and for a like period and at like intervals in at least one newspaper published in the City of Twin Falls, in the County of Twin Falls and State of Idaho.

Dated May 4, 1915.

(Signed) FRANK S. DIETRICH,
District Judge.

Filed May 4, 1915.

EXHIBIT "L".

(Title of Court and Cause.)

In Equity—No. 509.

ORDER.

It appearing that, pursuant to an order heretofore made in this cause, claims against the above-named defendant have been filed and subsequently reported to this Court by the Receiver herein:

It is now Ordered that any person interested and who desires to contest the validity of or the amount due upon any such claim, shall, on or before January 17, 1916, file herein his objections thereto wherein he shall join issue as to such claim.

It is further ordered that hearing upon the issues so joined is hereby set for February 14, 1916, at two o'clock P. M.

It is directed that the Clerk of this Court shall immediately hereafter mail a copy of this order to the solicitors for each of the several claimants at their respective addresses or in case no solicitor appears for any claimant, then a copy shall be mailed to such claimant.

Dated this 24th day of December, 1915.

FRANK S. DIETRICH,

District Judge.

Filed Dec. 24, 1915.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity—No. 526.

PETITION OF AMERICAN WATER WORKS
AND ELECTRIC COMPANY FOR APPEAL,
AND ORDER ALLOWING APPEAL.

Comes now The American Water Works and Electric Company, a corporation, and conceiving itself aggrieved by the orders made and entered herein on the 14th day of February, 1916, and 1st day of March, 1916, in the above entitled cause, denying the petition or application of your petitioner to intervene in said cause, and by the decree made and entered herein on the 6th day of Dec., 1915, and from the order made and entered March 1st, 1916, directing payment of money thereunder, and appeals from said orders and decree so made and entered as aforesaid to the United States Circuit Court of Appeals for the Ninth Circuit, insofar as said orders and decree order and direct the Special Master to disburse what was designated in said decree as the "Unsecured Creditors' Fund" among certain designated creditors, to-wit: Guy I. Towle, Carl J. Hahn as administrator of the estate of Harry M. King, deceased, L. M. Plumer and E. B. Scull, as executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, to the exclusion of other creditors of the defendant Great Shoshone and Twin Falls Water Power Company, for the reasons specified in the assignment of errors which is filed herewith, and your petitioner prays that this appeal may be allowed and that citation issue as provided by law, and that a transcript

of the record, proceedings and papers upon which said decree and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner, desiring to stay the enforcement of said order and decree insofar as the same authorize or direct the Special Master to pay out or disburse such Unsecured Creditors' Fund, pending the determination of this appeal and to preserve such Unsecured Creditors' Fund pending such appeal, tenders a supersedeas bond in such amount as the Court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued.

March 4, 1916.

WYMAN & WYMAN,
Solicitors for American Water Works and
Electric Company.

ORDER ALLOWING APPEAL.

And now, to-wit, on the 4th day of March, 1916, IT IS ORDERED that the petition be granted and the appeal be allowed as prayed for, from the orders but not from the decree, the same to operate as a supersedeas upon the petitioner filing a bond in the sum of \$3,000.00 with sufficient sureties, to be conditioned as required by law.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed March 4, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

In Equity—No. 526.

ASSIGNMENT OF ERRORS.

And now comes the American Water Works and Electric Company, a corporation, and having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered in the above entitled cause on the 6th day of December, 1915, and from an order made and entered herein on the 14th day of February, 1916, and from an order entered herein on the 1st day of March, 1916, denying the petition of the undersigned for leave to intervene in said cause, and says that said decree and said orders made and entered as aforesaid and the decision made and filed by the Court in this cause on the 28th day of February, 1916, are erroneous and unjust to this intervenor, and particularly in this:

1. Because the Court erred in holding, adjudging and decreeing in its said decree, that the Unsecured Creditors' Fund in said decree mentioned should be paid to Guy I. Towle, Carl J. Hahn as administrator of the estate of Harry M. King, deceased, L. M. Plumer and E. B. Scull as executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, in the respective amounts set forth in said decree, and that the balance, if any, of said fund should then be paid to the complainant, Equitable Trust Company of New York, and in thereafter ordering the payment and distribution of said secured creditors' fund to the above named parties.

2. Because the Court erred in not holding and decreeing that such Unsecured Creditors' Fund should be paid to the Receiver of the Great Shoshone and Twin Falls Water Power Company in Equity Cause No. 509, for distribution and payment in said cause according to the principles of equity and the respective rights of the creditors of said Great Shoshone and Twin Falls Water Power Company.

3. Because the Court erred in not permitting the American Water Works and Electric Company to intervene in said cause and share in the distribution of said Unsecured Creditors' Fund equitably and ratably with the other creditors of said Great Shoshone and Twin Falls Water Power Company, or with the said Guy I. Towle, C. J. Hahn, administrator as aforesaid, L. M. Plumer and E. B. Scull, executors as aforesaid, and Jake M. Shank.

4. Because the Court erred in for any reason denying the application of the American Water Works and Electric Company to intervene in said cause.

5. Because the Court erred in denying on the 14th day of February, 1916, the petition in intervention and complaint in intervention then tendered by said American Water Works and Electric Company, and in requiring it to make further or additional showing before it would be permitted to intervene.

6. Because the Court erred in holding and deciding that the petition and complaint in intervention tendered on the 28th day of February, 1916, by said American Water Works and Electric Company were insufficient, and in holding and deciding that said

Company was not entitled to intervene in said cause or share in said Unsecured Creditors' Fund.

WHEREFORE, said intervener, American Water Works and Electric Company, prays that the orders so made and entered as aforesaid on the 14th day of February, 1916, and the first day of March, 1916, be annulled and set aside and the District Court directed to permit the said American Water Works and Electric Company to intervene in said cause and share in the distribution of said Unsecured Creditors' Fund, and that such fund be administered and distributed in accordance with the prayer of said complaint in intervention and in accordance with the principles of equity governing the administration and distribution of estates of insolvent debtors, and that the said decree insofar as it orders or directs the Special Master to pay over and distribute said Unsecured Creditors' Fund to any one other than the Receiver of said Great Shoshone and Twin Falls Water Power Company, be modified and corrected, and that it be ordered and directed that said Unsecured Creditors' Fund be paid over to said Receiver in accordance with the prayer of said complaint in intervention.

March 4, 1916.

WYMAN & WYMAN,
Solicitors for American Water Works and
Electric Company.

Endorsed: Filed March 4, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

In Equity—No. 526.

BOND ON APPEAL.

Know all Men by These Presents, That we, American Water Works and Electric Company, a corporation organized under the laws of the State of Virginia, as principal, and the American Surety Company of New York, a corporation organized under the laws of the State of New York, as surety, are held and firmly bound unto the defendants, Guy I. Towle and Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, and the interveners L. M. Plumer and E. B. Scull, executor of the estate of L. L. McClelland, deceased, and Jake M. Shank, and the complainant The Equitable Trust Company of New York, as Trustee, and the other defendants above named, as their respective interests may appear under the decree entered in said cause on the 6th day of December, 1915, and under the orders from which the appeal hereinafter mentioned is taken, in the penal sum of Three Thousand Dollars (\$3,000.00), to be paid to the said defendants, interveners, and complainant as their respective interests may appear, as aforesaid, their and each of their executors, administrators, successors, or assigns, not exceeding, however, in the aggregate the said sum of \$3,000.00; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 4th day of March, in the year of our Lord, One Thousand Nine Hundred and Sixteen.

The condition of this obligation is such, that:

WHEREAS, the above named American Water Works and Electric Company, the said principal, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from certain orders made in said cause on the 14th day of February, 1916, and the first day of March, 1916, by the United States District Court for the District of Idaho, Southern Division; denying the petition of said principal to intervene in said suit and ordering certain disbursements and payments to be made out of the Unsecured Creditors' Fund created under the decree entered in said cause on the 6th day of December, 1915;

NOW, THEREFORE, If the above named principal, American Water Works and Electric Company, shall prosecute its said appeal to effect, and answers all damages and costs, if it fails to make its said plea good, then the above obligation to be void; otherwise, the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF, the said principal has caused its name to be hereunto subscribed by its duly authorized solicitors and attorneys, and the said surety has caused its name to be hereunto subscribed by

its duly authorized officers and its corporate seal affixed the day and year first above written.

AMERICAN WATER WORKS AND ELECTRIC
COMPANY,

By WYMAN & WYMAN,
Its Solicitors.

AMERICAN SURETY CO. OF NEW YORK,

By BRADLEY SHEPPARD,

Attest: Resident Vice-President.

OLIVER O. HAGA,

Resident Assistant Secretary.

The foregoing Bond is hereby approved to operate as a supersedeas, and all orders heretofore made relative to the payment or disbursement of the Unsecured Creditors' Fund mentioned in the decree herein and the provisions of the decree relative to the disbursement of such fund, are hereby stayed to the end that such fund may remain intact until the determination of the appeal.

Dated this 6th day of March, 1916.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed March 6, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity—No. 526.

PRAECIPE ON APPEAL OF THE AMERICAN
WATER WORKS AND ELECTRIC COMPANY.

To the Clerk of the above entitled Court:

You will please prepare the record on the appeal of the American Water Works and Electric Company

taken in the above entitled cause from those certain orders entered therein on February 14, 1916, and March 1st, 1916, denying the petition of said American Water Works and Electric Company to intervene, and that certain order of March 1st, 1916, made and entered therein directing the Special Master to pay prior lien claimants.

Such record is to consist of the following:

1. Petition of the American Water Works and Electric Company to intervene.

2. Complaint of the American Water Works and Electric Company in intervention.

3. Amended complaint of the American Water Works and Electric Company in intervention lodged on or about March 4, 1916, and dated February 28, 1916.

4. Statement on appeal of the American Water Works and Electric Company.

5. Orders of February 14, 1916, and March 1st, 1916, denying the petition of the American Water Works and Electric Company to intervene.

- 5-A. Petition for order on Special Master to pay prior lien claims.

6. Order of March 1st, 1916, directing Special Master to pay prior lien claimants.

7. All papers in connection with this appeal:

Petition of the American Water Works and Electric Company on appeal.

Order allowing appeal of the American Water Works and Electric Company.

Assignment of Errors of American Water
Works and Electric Company.

Citation of American Water Works and Elec-
tric Company on appeal.

Bond of American Water Works and Electric
Company on appeal.

The orders referred to in 5 and 6 above are set out in full as exhibits to the statement of the appeal of the American Water Works and Electric Company and it will, therefore, be unnecessary to again set them out in full.

The petition numbered 5-A, referred to above, is set out in full in this volume at page 224 and made part hereof.

The petition, complaint and amended complaint referred to in 1, 2 and 3 above are also set out in full as exhibits to the statement on appeal of the American Water Works and Electric Company, and it is unnecessary to set them out again in full.

WYMAN & WYMAN,
Solicitors for Appellant, American Water
Works and Electric Company.

Copy received this April 22, 1916, and we join in this praecipe.

MARTIN & CAMERON,
Attorneys for L. M. Plumer, E. B. Scull,
as executors of the estate of L. L. Mc-
Clelland, deceased.

KARL PAINE,
Attorney for Guy I. Towle.

A. A. FRASER,
By MARTIN & CAMERON,
Attorneys for Jake M. Shank.

J. H. WISE,

By MARTIN & CAMERON,
Attorney for Carl J. Hahn, Administrator.

Endorsed: Filed April 22, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity—No. 526.

CITATION.

United States of America,—ss.

To the Defendants, Guy I. Towle, Carl J. Hahn, as administrator of the Estate of Harry M. King, deceased, Great Shoshone and Twin Falls Water Power Company, a corporation, William T. Wallace, as Receiver of Great Shoshone and Twin Falls Water Power Company, and to the Interveners, L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, and to the Complainant, Equitable Trust Company of New York, as sole Trustee under a deed of trust made by Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and supplemental mortgages dated June 21, 1911, and April 7, 1913:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco in the State of California, within thirty

days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, by the American Water Works and Electric Company, Trustee, is complainant, and the Great Shoshone and Twin Falls Water Power Company, a corporation, William T. Wallace, as Receiver of said Great Shoshone and Twin Falls Water Power Company, Guy I. Towle, and Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, are defendants, and L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, are interveners, to show cause, if any there be, why the orders and decrees in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Frank S. Dietrich, United States District Judge for the District of Idaho, this 6th day of March, nineteen hundred and sixteen, and of the Independence of the United States the one hundredth and fortieth year.

FRANK S. DIETRICH,

(Seal)

District Judge.

Attest:

W. D. McREYNOLDS, Clerk.

Service of the foregoing citation and receipt of copy thereof, admitted this 6th day of March, 1916.

RICHARDS & HAGA,

Solicitors for Complainant, Equitable Trust
Company of New York, Trustee.

P. B. CARTER,

Solicitor for Great Shoshone and Twin
Falls Water Power Company.

S. H. HAYS,

Solicitor for William T. Wallace, Receiver
of Great Shoshone and Twin Falls Wa-
ter Power Company.

KARL PAINE,

Solicitor for Guy I. Towle, Defendant.

JAMES H. WISE,

By MARTIN & CAMERON,

Solicitor for Carl J. Hahn as Administra-
tor of the estate of Harry M. King, de-
ceased, Defendant.

MARTIN & CAMERON,

Solicitors for L. M. Plumer and E. B. Scull,
Executors of the estate of L. L. McClel-
land, deceased, Interveners.

ALFRED A. FRASER,

Solicitor for Jake M. Shank, Intervener.

Endorsed: Filed March 6, 1916.

W. D. McReynolds, Clerk.

RETURN TO RECORD.

And thereupon it is ordered by the court that the foregoing transcript of the record and proceedings in the causes aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest: W. D. McREYNOLDS,

(Seal)

Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the record on the appeal herein of The Equitable Trust Company of New York consists of those pleadings and proceedings designated in its praecipe, set out in full herein on pages 258 to 264, inclusive, and that the record on the appeal herein of the American Water Works and Electric Company consists of those pleadings and proceedings designated by its praecipe, set out in full herein on pages 354 to 356, inclusive; and I further certify that the above and foregoing transcript from pages numbered 1 to 361, inclusive, to be a full, true and complete transcript of all pleadings and proceedings required to be included therein by the praecipis aforesaid.

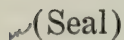
I further certify that the cost of the record herein on the appeal of The Equitable Trust Company of New York amounts to the sum of \$313.10, and that the said appellant has paid the same, and that the cost of the record on the appeal of the American Water Works and Electric Company amounts to the sum of \$132.15, and that the said American Water Works and Electric Company has paid the same.

I further certify that the time in which to certify and file the record on the appeals of The Equitable Trust Company of New York and the American Water Works and Electric Company and docket the cause in the Circuit Court of Appeals for the Ninth

Circuit was by the Court enlarged and extended to and including the 6th day of May, 1916.

Witness my hand and the seal of said court this 29th day of April, 1916.

W. D. McREYNOLDS,

 (Seal)

Clerk.

